14-570

Strong

aff'd.

Strong affirm'd

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~381.~~ 177

BRIAN PHILPOT, GEORGE J. SHERMAN, AND HENRY E. PICKET, PLAINTIFFS IN ERROR,

vs.

ALICE B. GRUNINGER, EXECUTRIX OF LAWRENCE GRUNINGER, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED DECEMBER 10, 1870.

Dec. 1871

SUPREME COURT OF THE UNITED STATES.

No. 381.

BRIAN PHILPOT, GEORGE J. SHERMAN, AND HENRY E. PICKET, PLAINTIFFS IN ERROR,

vs.

ALICE B. GRUNINGER, EXECUTRIX OF LAWRENCE GRUNINGER, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Præcipe	2	1
Bond for costs	3	1
Summons	4	2
Death of plaintiff suggested, &c.	7	3
Declaration	7½	3
Pleas of Philpot and Picket	15	6
Demurrer to pleas of Philpot and Picket	40	13
heard and taken under advisement	42	14
sustained, and leave to amend pleas	43	14
Replication to pleas of Philpot and Picket	44	14
Plea of Sherman	49	16
Replication to pleas of Sherman	56	19
Leave to amend replication to plea of Sherman	60	21
Leave to amend declaration and hearing cause	60	21
Hearing continued	61	21
Hearing continued	62	22
Verdict	63	22
Motion for new trial	63	22
Judgment	65	23
Bill of exceptions, (from page 67 to 239, inclusive)	67	24
Philpot, Sherman & Co.'s note	67	24
Philpot, Sherman & Co.'s letter of July 5, 1865	68	24
Gruninger's letter of July 7, 1865	69	25
Philpot, Sherman & Co.'s letter of July 5, 1865	71	25
Agreement of April 21, 1865	72	26
Deposition of J. B. Bradley	79	28

	Original.	Print.
Gruninger's letter of May 20, 1865	106	36
Deposition of George T. Barnes	109	37
Deposition of S. Bonsal	120	41
Exhibit B, referred to in deposition (telegram)	132	44
Exhibit A, referred to in deposition (agreement)	133	44
Deposition of N. Coombs	137	46
Charter	147	47
Deed from Gruninger	151	50
Agreement of October 19, 1864, Blood Farm	153	51
Articles of copartnership	155	51
Testimony of Thompson	157	52
Agreement of October 19, 1864, Smith Farm	159	53
Deposition of D. W. Prince	160	53
Exhibit A, referred to in deposition (agreement)	174	57
Exhibit B, referred to in deposition (telegram)	179	59
Deposition of P. B. Cushman	194	63
Certificate of secretary of state	209	67
Testimony of Erwin	218	70
Letter of Picket of February 24, 1865	222	71
Charge to jury	224	72
Appeal bond	239	76
Certificate to transcript	242	77
Writ of error	243	77
Assignment of errors	245	78

1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-room, in the city of Chicago, in the district aforesaid, before the Hon. Thomas Drummond, district judge of the United States for said district, and in the absence pro tempore of the Hon. David Davis, one of the justices of the Supreme Court of the United States, sole judge of said circuit court, on Friday, the seventeenth day of December, in the year of our Lord one thousand eight hundred and sixty-nine, in the October term of said court for said year, and of our independence the ninety-fourth year.

WILLIAM H. BRADLEY, *Clerk.*

ALICE B. GRUNINGER, EXECUTRIX OF LAWRENCE Gruninger, deceased,
vs.
BRIAN PHILPOT, GEORGE J. SHERMAN, AND Henry E. Picket. } Assumpsit.

2 NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that, on the fifteenth day of October, in the year of our Lord one thousand eight hundred and sixty-seven, came Lawrence Gruninger, plaintiff, by Messrs. Hutchinson and Luff, his attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, his præcipe for a writ of summons against Brian Philpot, George J. Sherman, and Henry E. Picket, defendants, and also at the same time filed his bond for costs in said entitled cause, which said præcipe and bond are respectively in the words and figures following, to wit:

Præcipe.

Circuit court of the United States for the northern district of Illinois.

LAWRENCE GRUNINGER
vs.
BRIAN PHILPOT, GEORGE J. SHERMAN, and Henry E. Picket, late copartners, trading as Philpot, Sherman & Co. } Assumpsit. Damages $4,000.

3 The clerk of said court will please issue a summons in the above case returnable on the first Monday in December next.

HUTCHINSON & LUFF,
Plaintiff's Attorneys.

To WILLIAM H. BRADLEY, *Clerk.*

OCT. 15th, 1867.

(Indorsed:) Filed Oct. 15, 1867. W'm H. Bradley, cl'k.

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, December term, A. D. 1867.

LAWRENCE GRUNINGER
vs.
BRIAN PHILPOT, ET AL. } In assumpsit.

We enter ourselves security for costs in this cause and promise to pay

all costs which may accrue to the opposite party in this action or to any of the officers of this court, and, in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, hereby agree and stipulate that execution may issue against our property for any costs taxed against him. Dated this 15th day of October, A. D. 1867.

4 HUTCHINSON & LUFF.

(Endorsed:) Filed Oct. 15th, A. D. 1867. W'm H. Bradley, clerk.

On the same day, to wit, the 15th day of October, A. D. 1867, a writ of summons issued out of said clerk's office against said defendants in said entitled cause, which said summons, together with the return of the marshal thereon, is in the words and figures following, to wit:

Summons.

Circuit court of the United States of America.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you that you summon Brian Philpot, George J. Sherman, and Henry E. Picket, late copartners, trading as Philpot, Sherman & Co., if they shall be found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, at the next term thereof, to be holden at

5 Chicago, in the district aforesaid, on the third Monday of December next, to answer unto Lawrence Gruninger in a plea of trespass on the case upon promises, to his damage, as he alleges, of four thousand dollars, and have you then and there this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 15th day of October, in the year of our Lord one thousand eight hundred and sixty-seven, and of our independence the 92d year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Know all men by these presents that I have appointed, and by these presents do appoint, S. H. Tourtellotte my true and lawful deputy to execute the annexed writ (Lawrence Gruninger vs. Brian Philpot et al.) and to make true return thereon according to law.

J. R. JONES. [SEAL.]

6 *United States Marshal of the Northern District of Illinois.*

I have executed the annexed writ by reading the same to and in the presence and hearing of Brian Philpot, on the 17th day of October, 1867, and by reading the same to and in the presence and hearing of Henry E. Picket, on the 18th day of October, 1867. George J. Sherman not found in my district.

J. R. JONES,
United States Marshal of the Northern District of Illinois.
By S. H. TOURTELLOTTE,
Special Deputy.

S. H. Tourtellotte being first duly sworn, deposes and says that he served the annexed writ as stated in the foregoing return.

Sworn to before me this 19th day of October, A. D. 1867.

P. A. HOYNE,
U. S. Com. N. D. Ill.

(Endorsed:) Filed Oct. 31st, A. D. 1867. W'm H. Bradley, clerk.

7 On this day, to wit, the 26th day of October, in the adjourned October term, A. D. 1868, of said court, in the record of the proceedings thereof, in said entitled cause, is the following entry, to wit:

Death of pl'ff suggested.

LAWRENCE GRUNINGER } *vs.* BRIAN PHILPOT ET AL. } Assumpsit.

Now comes O. K. A. Hutchinson, esq., the attorney of the plaintiff, and suggests to the court the death of the plaintiff, Lawrence Gruninger, and, on his motion, Alice B. Gruninger, executrix of said Lawrence Gruninger, deceased, is substituted as plaintiff herein.

7½ On this day, to wit, the 30th day of October, A. D. 1868, came said plaintiff, by her attorneys, and filed in said clerk's office her declaration in said entitled cause, which said declaration is in the words and figures following, to wit:

Declaration.

Circuit court of the United States for the northern district of Illinois.
October term, A. D. 1868.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Alice B. Gruninger, executrix of the last will and testament of Lawrence Gruninger, deceased, plaintiff in this suit, who is a citizen of the State of Massachusetts, by Hutchinson & Luff, her attorneys, complains of Brian Philpot, George J. Sherman, and Henry E. Picket, (late copartners, trading as Philpot, Sherman & Co.,) defendants herein, who are citizens of the State of Illinois, and residents of said district, and who have been summoned, &c., of a plea of trespass on the case upon promises.

For that whereas the said defendants heretofore and in the life-
8 time of the said Lawrence Gruninger, since deceased, to wit, on the sixth day of May, A. D. 1865, at "Philad'a," meaning thereby Philadelphia, to wit, at said district, made their certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the same day and year aforesaid, and thereby by their firm name of Philpot, Sherman & Co., then and there promised to pay, on demand, to the said Lawrence Gruninger or order, the sum of three thousand dollars, for value received, and then and there delivered the said promissory note to said Lawrence Gruninger, by means whereof, and by force of the statute in such case made and provided, they, the said defendants, then and there became liable to pay to the said Lawrence Gruninger, the said sum of money in the said promissory note specified, according

to the tenor and effect of the said promissory note; and being so liable, they, the said defendants, in consideration thereof, afterwards, and in the lifetime of the said Lawrence Gruninger, to wit, on the day and year aforesaid, and at the district aforesaid, undertook and faithfully promised the said Lawrence Gruninger to pay him the said sum
9 of money in the said promissory note specified, according to the tenor and effect of the said note.

And the said plaintiff, in fact, saith that, afterwards, to wit, on the 6th day of June, A. D. 1865, to wit, at the district aforesaid, payment of the said sum of money in the said promissory note specified was duly demanded by the said Lawrence Gruninger, in his lifetime, of the said defendants, according to the tenor and effect of the said promissory note.

And also, for that whereas the said defendants heretofore, and in the lifetime of the said Lawrence Gruninger, since deceased, to wit, on the 6th day of May, A. D. 1865, at "Philad'a," meaning thereby Philadelphia, to wit, at said district, made their certain other promissory note in writing, bearing date the day and year aforesaid, and thereby, by their firm name of Philpot, Sherman & Co., then and there promised to pay, on demand, to the said Lawrence Gruninger or order, the sum of three thousand dollars, for value received, and then and there delivered the said promissory note to the said Lawrence Gruninger; by means
10 whereof, and by force of the statute in such case made and provided, they, the said defendants, then and there became liable to pay to the said Lawrence Gruninger, the said sum of money in the said last-mentioned promissory note specified, according to the tenor and effect of the said promissory note; and being so liable, they, the said defendants, in consideration thereof, afterwards, and in the lifetime of the said Lawrence Gruninger, to wit, on the day and year last aforesaid, at the district aforesaid, undertook and faithfully promised the said Lawrence Gruninger to pay him the said sum of money in the said last-mentioned promissory note specified, according to the tenor and effect of the said note, and in the lifetime of the said Lawrence Gruninger.

And also, for that whereas the said defendants afterwards, to wit, on the 6th day of June, in the year of our Lord one thousand eight hundred and sixty-five, at Philadelphia, to wit, at Chicago, in the northern district of Illinois, aforesaid, were indebted to the said Lawrence
11 Gruninger in the sum of four thousand dollars, lawful money of the United States of America, for divers goods, wares, and merchandise by the said Lawrence Gruninger in his lifetime before that time sold and delivered to the said defendants, and at their special instance and request; and also, in the further sum of four thousand dollars, of like lawful money, for so much money before that time lent and advanced by the said Lawrence Gruninger in his lifetime to the said defendants, and at their special instance and request; and for other money, by the said Lawrence Gruninger, before that time paid, laid out, and expended for the said defendants, and at the like request of the said defendants; and for other money by the said defendants before that time had and received to and for the use of the said Lawrence Gruninger; and also, in the further sum of four thousand dollars for so much money before that time, and then due and payable, from the said defendants to the said Lawrence Gruninger, for interest upon,
12 and for the forbearance of divers large sums of money before then due and owing from the said defendants to the said Lawrence Gruninger, and by the said Lawrence Gruninger forborne to the said defendants for divers long spaces of time before then elapsed, at the like special instance and request of the said defendants. And being

so indebted they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at Philadelphia, to wit, at Chicago, in the northern district of Illinois aforesaid, undertook and then and there faithfully promised the said Lawrence Gruninger to pay him the said several sums of money in this count mentioned when they, the said defendants, should be thereunto afterwards requested.

And whereas also, the said defendant afterwards, to wit, on the day and year last aforesaid, at Philadelphia, to wit, at Chicago, in the northern district of Illinois aforesaid, accounted with the said Lawrence Gruninger, of and concerning divers other sums of money from the said defendant to the said Lawrence Gruninger before that time due and owing, and then in arrear and unpaid, and upon such accounting,
13 the said defendants then and there found to be in arrear and indebted to the said Lawrence Grunninger in the further sum of four thousand dollars, of like lawful money; and being so found in arrear and indebted, they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year and at the place last aforesaid, undertook and then and there faithfully promised the said Lawrence Gruninger to pay him the said last-mentioned sum of money when they, the said defendants, should be thereunto afterwards requested.

Yet the said defendants, not regarding their said several promises and undertakings, but contriving to deceive and defraud the said Lawrence Gruninger in his lifetime, and the said plaintiff, as executor as aforesaid, since the death of the said Lawrence Gruninger in this behalf, hath not as yet paid the said several sums of money, or any or either of them, or any part thereof, to the said Lawrence Gruninger in his lifetime, or to the said plaintiff since the death of the said Lawrence Gruninger, although often requested so to do, to wit, on the said 6th day of June, A. D. 1865, and many times since, to wit, at the district aforesaid;
14 but they, to do this, have wholly refused and still refuse to pay the same, or any part thereof, to the said plaintiff, to the damage of the said plaintiff of four thousand dollars; and therefore she brings her suit, &c. And the said plaintiff brings into court here the letters testamentary of the said Lawrence Gruninger, deceased, whereby it fully appears to the court here that the said plaintiff is executrix of the said last will and testament of the said Lawrence Gruninger, deceased, and hath the execution thereof, &c.

HUTCHINSON & LUFF,
Pl'ff's Att'ys.

Copy of instrument and account sued upon.

[U. S. rev. stamp, $1 50.]

PHILAD'A, *May 6th*, 1865.

On demand, we promise to pay Lawrence Gruninger or order, three thousand dollars, for value received.

$3,000.] PHILPOT, SHERMAN & CO.

Philpot, Sherman & Co. to Lawrence Gruninger, Dr.

For goods, wares, & merchandize sold & delivered.....	$4,000 00
" money lent & advanced	$4,000 00
" " paid, laid out, & expended.....	$4,000 00
" " had & rec'd to use of s'd Gruninger.....	$4,000 00
" balance due on account stated	$4,000 00

(Endorsed:) Filed Oct. 30, 1868. W'm H. Bradley, cl'k.

15 On this day, to wit, the 12th day of January, A. D. 1869, came said defendants, Brian Philpot and Henry E. Picket, by Messrs. Gookins and Roberts, their attorneys, and filed in said clerk's office their pleas in said entitled cause, which said pleas are in the words and figures following, to wit:

Pleas of Picket & Philpot.

United States circuit court, northern district of Illinois.

16 BRIAN PHILPOT, HENRY E. PICKET, George J. Sherman *ats.* ALICE B. GRUNINGER, ADMINISTRATRIX OF the estate of the Lawrence Gruninger, deceased. } Assumpsit.

And the said defendants, Brian Philpot and Henry E. Picket, severing in their defence from the said George J. Sherman, come and defend the wrong and injury, when, &c.. and say that they did not undertake and promise in manner and form as the said plaintiff has above complained against them; and of this they put themselves upon the country.

GOOKINS & ROBERTS,
Att'ys for Def'ts Philpot & Picket.

2d plea. And for a further and second plea in this behalf, the first and second counts in the plaintiff's declaration, the said defendants, severing as aforesaid, say the said plaintiff ought not to have and maintain her action aforesaid against them. because they say that, hereto-
17 fore, to wit, on the twenty-first day of April, A. D. 1865, and in the lifetime of the said Lawrence Gruninger, the said defendants and said George J. Sherman, partners, by their name and style of Philpot, Sherman & Co., and certain other persons by the name, firm, and style of Prince & Erwin, and certain other persons by the name, firm, and style of E. C. Bradley and Brother, made and entered into a certain agreement in writing, in and by which it was agreed by the said parties with each other that they would furnish the thereinafter-mentioned properties at the prices thereto attached, for the purpose of forming a stock company, the name and style of which should be thereafter determined on; that is to say, the said Prince and Erwin agreed for their part to furnish and put into the said company the following interests, to wit: One twenty-fourth working interest, to wit, one forty-eighth part of the oil in the Lady Washington Well, and lease on the Blood Farm, producing about sixty-five barrels; one-sixteenth working interest, to
18 wit, one thirty-second part of the oil in the Demming Well, and lease on the John McClintock Farm, producing twenty-five barrels; one-sixteenth working interest, to wit, one thirty-second part of the oil in Follett Well, and lease on the McClintock Reserve, said well drilled and ready for testing; one-third working interest, to wit, one-eighth part of the oil in the Erwin Well, and lease on the McClintock Reserve, producing thirty barrels; one thirty-second working interest, to wit, one sixty-fourth part of the oil in the Amazon Well, and lease on the Smith Farm, producing forty barrels, with one other well going down; one-half working interest, to wit, one-fourth of the oil in well and lease number eleven-Smith Farm, producing fifty barrels. The price at which the said interests were to be put into the joint property of the company was to be fifty

two thousand dollars. And the said defendants, firm of Philpot, Sherman & Co., agreed for their part to furnish and put into said company the following properties, to wit: One-eighth land interest in the James A. Stevenson Farm—one well going down—ninety-eight acres; one-fourth
19 land interest in five acres of the Pit Hole Farm known as the Reynold's Farm, being the same five acres sold by them to Andrews and Byers, upon which two wells were to be put down at once; ten acres in fee, part of said Reynold's Farm, four and one-quarter acres in fee, part of the farm known as the Ackerman Farm, on Cherry Run, subject to a reservation of one-twentieth of the oil to the original proprietors. The price at which the said interests so to be furnished by said defendants, said firm, were to be put into the joint property of the company was to be fifty thousand dollars. And the said E. C. Bradley and Brother agreed for their part to furnish and put into said company the following properties, to wit: One-sixteenth working interest, to wit, one thirty-second part of the oil in the Fee Well, and lease number nine on the Smith Farm, then producing about twenty barrels per day, and one other well going down to be completed free of expense to the company; one-fourth working interest, to wit, one-eighth part of the oil in three wells and leases numbered nine, sixteen, and twenty-one on the
20 John McClintock Farm, said wells then going down and to be completed and tested free of charge to the company; one-fourth of the oil-land interest in two half-acre leases on McClure Farm, numbers seven and eight, on Cherry Run; two wells going down, one sixteenth free interest, to wit, one thirty-second part of the oil in lot number eighteen, McFate Farm, sixty rods above Smith Farm, on Cherry Run, and well down six hundred feet. The price at which the above interests were to be put into the joint property of the company was to be thirty-two thousand dollars, making in all as the cost price of the property to be put in one hundred and thirty-four thousand dollars. Each party was to furnish the necessary plans, surveys, briefs of title and conveyances at their own proper costs and charges. It was agreed that the said defendants and said Sherman were to take charge of the said property and to get a charter and take all proper and necessary steps for the formation of the company and procuring subscriptions to the
21 stock of the same, in which the other parties were to assist so far as they might be able. The parties putting in producing interests were to retain the production until the sum of . worth of the stock should be sold and the proceeds divided as thereafter mentioned, and then the production was to be turned over to the company; the par value of the shares of stock and the subscription price for the same should be five dollars and the capital stock should be sixty thousand shares, of which five thousand shares should be reserved for a working capital. As fast as the stock should be sold and the money realized the same should be divided pro rata among the parties thereto, and after all expenses of procuring the charter and other necessary expenses and commissions should have been paid the entire profits were to be divided among the several parties to said agreement pro rata according to the several amounts put in by each, whether the said profits should be in cash or in stock of the company. The election of directors & officers of the company, and the full organization of the same
22 was postponed for further consideration and agreement; and it was understood that if there should be a failure to make sale of sufficient stock to justify the organization of the company then the interests and properties aforesaid were to revert to their respective owners, and each party was to pay their pro rata share of the expenses in-

curred. And, afterwards, to wit, on the sixth day of May, in the year one thousand eight hundred and sixty-five, by the certain writing obligatory of the said Lawrence Gruninger, sealed with his seal, and now to the court here shown, the day and year last aforesaid, it was, by the said Lawrence Gruninger, agreed with the said parties to the agreement above set forth that he, the said Lawrence Gruninger, would put into the said company one-half of the working interest, it being one-fourth of all the oil in, or to be produced from, the lease and lot number eleven on the Smith Farm, Cherry Run, on the same terms and conditions that the other parties aforesaid were to furnish their several properties aforesaid, and that he, the said Lawrence Gruninger, was to take the same portion and pro rata of profits in the said company at and for the sum of thirty thousand dollars. And the defendants in fact say that the only consideration of the said promissory note set forth in the first and second counts of the plaintiff's declaration which are one and the same note was, that the said Lawrence Gruninger should and would enter into and become a party to the said company so proposed and agreed to be formed as aforesaid and should and would furnish and *and* put into said enterprise the said property specified in the said writing obligatory; and the said defendants in fact say that, although they, the said defendants and the said George J. Sherman, were then and there ready and willing, and then and there offered to keep and perform all the stipulations in the said agreement set forth to be kept and performed by them, whereof the said Lawrence Gruninger had notice, yet the said Lawrence Gruninger then and there wholly neglected and refused to become a party to the said company so proposed to be formed and wholly neglected and refused to furnish or put into said enterprise and company the property in the said writing obligatory mentioned. Wherefore the said defendants say that the consideration of the said note has wholly failed; and this they are ready to verify. Wherefore they pray judgment.

23

24

GOOKINS & ROBERTS,
Atty's for Def'ts Philpot & Pickett.

demurrer

3d plea. And the said defendants, severing as aforesaid, for a further and third plea in this behalf to the first and second counts in the plaintiff's declaration, say the said plaintiff ought not to have and maintain her action aforesaid against the said defendants, because they say that the parties in that behalf in the second plea mentioned made and entered into a certain agreement as in said second plea is first set forth. And afterwards, to wit, on the sixth day of May, 1865, the said Lawrence Gruninger, contriving and intending to obtain from the said defendants and said Sherman a promissory note of the kind, amount, and description set forth in the said first and second counts of the plaintiffs declaration, which are one and the same note, by fraud and covin fraudulently and deceitfully proposed to the said defendants and said Sherman that, in consideration that they and said Sherman would purchase from him a certain interest which he, the said Lawrence Gruninger, pretended he had in certain oil lands situated in the county of Venango, and State of Pennsylvania, at and for the price of three thousand dollars, and execute to him their promissory note therefor, he would become a party to the enterprise set forth in said agreement, and would put into the said enterprise the interest in oil lands in the writing obligatory of the said Lawrence Gruninger, in said second plea mentioned, upon the terms in the said writing obligatory

25

set forth; and to carry into effect the said fraudulent purpose the said Lawrence Gruninger thereupon made his certain writing obligatory of the kind and description in the said second plea set forth.

And thereupon the said defendants and said Sherman upon the consideration aforesaid, & upon no other consideration, & relying upon his said promise and undertaking, did purchase from him the said pretended interest, executed to the said Lawrence Gruninger the said promissory note for the said three thousand dollars therefor in the said first and second counts of the plaintiff's declaration mentioned. And the said defendants aver and say that the said Lawrence Gruninger never did enter into the said enterprise, nor put into the same the said interest in oil lands in said writing obligatory mentioned, but that his offer, proposal, and covenant to so do, were a fraudulent device and trick of the said Lawrence Gruninger to obtain the said promissory note from the said defendants and said Sherman by fraud and covin, and so the said defendants say that the said promissory note was obtained from them by fraud; and this they are ready to verify. Wherefore they pray judgment.

GOOKINS & ROBERTS,
Att'ys for defendants Philpot & Picket.

4th plea. And for a further and fourth plea in this behalf to the first and second counts of the plaintiff's declaration, severing as aforesaid, say actio non; because they say that the parties in that behalf in the second plea mentioned, made and entered into a certain agreement in writing of the kind and description in said second plea firstly set forth and stated. And that, afterwards, to wit, on the sixth day of May, 1865, the said Lawrence Gruninger agreed with the said defendants and said George J. Sherman that if the said defendants and said Sherman would pay him, the said Lawrence Gruninger, the sum of three thousand dollars, and execute to him their promissory note therefor, he, the said Lawrence Gruninger, would sell to the said defendants and said Sherman one-eighth part of the working interest, being one-sixteenth part of all the oil produced from well number two, on lot number seven, east side of Oil Creek, on the Blood Farm, in the county of Venango, and in the State of Pennsylvania, the said interest at all times to be subject to one-eighth of the working expenses of said well, and in all respects to be subject to the original lease from James A. McCray to F. E. Morse, and would enter into and become a party to the company proposed to be formed as in said agreement mentioned, and would put into and contribute towards the assets of such company certain property of him, the said Lawrence Gruninger, of the kind and description, and being the same property as is set forth and stated in the writing obligatory of him, the said Lawrence Gruninger, in said second plea mentioned. And thereupon the said Lawrence Gruninger executed his certain writing obligatory of the kind and description, & being the same as is in said second plea described and set forth, which is now to the court here shown. And the said defendants say that, in consideration of the said promise & undertaking of the said Gruninger, & for no other consideration, they agreed to pay him the said sum of three thousand dollars; & they further say that, to secure the payment of the said sum of three thousand dollars so agreed to be paid as aforesaid, and only *upon* for the consideration aforesaid, they, the said defendants and said Sherman, gave to the said Lawrence Gruninger the said promissory note in the first and second counts of the plaintiff's declaration set forth, which are one and the same note, and for no

other consideration whatever. And the said defendants in fact say, that although the said company was duly and within a reasonable time formed and incorporated as proposed in said first-mentioned agreement, whereof the said Lawrence Gruninger had notice, yet the said Lawrence Gruninger did not, nor would enter into and become a party to the said company, and did not, nor would put into & contribute toward the assets of said company the property in said writing obligatory mentioned, but wholly refused so to do. And the said defendants say that the said property above mentioned and described, as being upon the Blood Farm, in the county of Venango, and State of Pennsylvania, was then and there greatly encumbered with assessments and charges against the same, and was then and there of no value, and said Lawrence Gruninger had no title thereto to sell to defendants, and so the said defendants say
30 that the consideration of the said note has wholly failed; and this they are ready to verify. Wherefore they pray judgment.

GOOKINS & ROBERTS,
Attorneys for defendants Philpot & Picket.

Demurrer.

5th plea. And for a further and fifth plea in this behalf, as to the sum of two thousand nine hundred and ninety-nine dollars, and all interest thereon, parcel of the said sum of money in the first and second counts of the plaintiff's declaration mentioned, the said defendants. severing as aforesaid, say actio non; because they say that the parties in that behalf in the second plea mentioned, made and entered into a certain agreement in writing, of the kind and description in said second plea firstly set forth and stated, and that, afterwards, to wit, on the sixth day of May, 1865, the said Lawrence Gruninger agreed with the said defendants and the said George J. Sherman, that if the said defendants and said Sherman would pay him, the said Lawrence
31 Gruninger, the sum of three thousand dollars, and execute to him their promissory note therefor, he, the said Lawrence Gruninger, would sell to the said defendants and said Sherman a certain property, described as in the last plea as being situated on the Blood Farm, in the county of Venango, and State of Pennsylvania, and would enter into and become a party to the company proposed to be formed as in said agreement mentioned, and would put into and contribute towards the assets of such company certain property of him, the said Lawrence Gruninger, of the kind and description, and as set forth and stated in the writing obligatory of him, the said Lawrence Gruninger, in said second plea mentioned; and thereupon, & in pursuance thereof, the said Lawrence Gruninger, executed his certain writing obligatory of the kind and description in said second plea described and set forth, which is now to the court here shown. And the said defendants say, that in consideration of the said promise and undertaking of the said Gruninger, and for no other consideration they agreed to pay him the said
32 sum of three thousand dollars, and that to secure the payment of the said sum of three thousand dollars, so agreed to be paid as aforesaid & pursuant to the agreement aforesaid, and only upon and for the consideration aforesaid, they, the said defendants and said Sherman, gave to the said Lawrence Gruninger the said promissory note in the first & second counts of the plaintiff's declaration set forth, which are one and the same note, and for no other consideration whatever. And the said defendants in fact say that, although the said company was duly and within a reasonable time formed and incorporated as proposed in said first-mentioned agreement, whereof the said Lawrence Gruninger had notice, yet the said Lawrence Gruninger did not nor

would enter into and become a party to said company, and did not nor would contribute towards the assets of said company, the property in said writing obligatory mentioned, but wholly refused so to do.

33 And the said defendants say that the said property above-mentioned and described as being situated on the Blood Farm, in the county of Venango, and State of Pennsylvania, was then and there of small value, to wit, of the value of one dollar; and so the said defendants say that the consideration of said promissory note has in part failed, to wit, in the sum of two thousand nine hundred and ninety-nine dollars, and all interest thereon; and this they are ready to verify. Wherefore they pray judgment.

GOOKINS & ROBERTS,
Attorneys for Defendants Philpot & Picket.

Demurred to

6th plea. And for a further and sixth plea in this behalf to the first and second counts of the plaintiff's declaration, the said defendants, severing as aforesaid, say actio non; because they say that the parties in that behalf in the second plea mentioned, made and entered into a certain agreement in writing, of the kind and description in said second plea firstly set forth and stated; and that, afterwards, to wit, on

34 the sixth day of May, 1865, the said Lawrence Gruninger agreed with the said defendants and said Sherman, that if the said defendants and said Sherman would pay him, the said Lawrence Gruninger, the sum of three thousand dollars he, the said Lawrence Gruninger, would sell to the said defendants and said Sherman the property in the fourth plea above mentioned as being situated on the Blood Farm, in the county of Venango, and State of Pennsylvania, and would enter into and become a party to the company proposed to be formed, as in said agreement first mentioned, and would put into and contribute towards the assets of such company certain property of *them*, the said Lawrence Gruninger, of the kind and description, and as set forth and stated in the writing obligatory of him, the said Lawrence Gruninger, in said second plea mentioned. And thereupon the said Lawrence Gruninger executed his said writing obligatory of the kind & description in said second plea described and set forth, which is now to the court

35 here shown. And the said defendants say that, in consideration of the said promise & undertaking of the said Gruninger, and upon no other consideration, they and said Sherman agreed to pay him said sum of three thousand dollars, and that to secure the payment of said sum of three thousand dollars, so agreed to be paid as aforesaid, for the consideration aforesaid, they, the said defendants and the said Sherman, gave to the said Lawrence Gruninger the said promissory note in the first and second counts of the plaintiff's declaration set forth, which are one and the same note, and for no other consideration whatever. And the defendants in fact say that, with the consent of the said Lawrence Gruninger, the said corporation was not formed as proposed in said first-mentioned agreement, and the said Lawrence Gruninger did not put into, nor contribute toward the assets of such corporation, the property of him, the said Lawrence Gruninger, in said writing obligatory of him, the said Lawrence Gruninger above-mentioned,

36 but wholly refused so to do. And the said defendants say that the said property above mentioned and described as being situated on the Blood Farm, in the county of Venango, and State of Pennsylvania, was then and there greatly encumbered with assessments and charges against the same, and was then and there of no value; and so the said defendants say that the consideration of the said note has

wholly failed; and this they are ready to verify. Wherefore they pray judgment.

GOOKINS & ROBERTS,
Attorneys for Defendants Philpot & Picket.

demurred to

7th plea. And for a further and seventh plea in this behalf as to the sum of two thousand nine hundred and ninety-nine dollars, and all interest thereon, parcel of the said sum of money in the first and second counts of the plaintiff's declaration mentioned, the said defendants, severing as aforesaid, say actio non; because they say that the parties in that behalf in the second plea mentioned made and entered into a certain agreement in writing, of the kind and description in said
37 second plea firstly set forth and stated; and that afterwards, to wit, on the sixth day of May, 1865, the said Lawrence Gruninger agreed with the said defendants and said Sherman that if they would pay him, the said Lawrence Gruninger, the sum of three thousand dollars he, the said Lawrence Gruninger, would sell to the said defendants and the said Sherman the said property described as being situated on the said Blood Farm, in the county of Venango, and State of Pennsylvania, and would enter into and become a party to the company proposed to be formed as in said agreement mentioned, and would put into and contribute towards the assets of such company certain property of him, the said Lawrence Gruninger, of the kind and description and as set forth and stated in the writing obligatory of him, the said Lawrence Gruninger, in said second plea mentioned; and thereupon the said Lawrence Gruninger executed his certain writing obligatory, of
38 the kind and description in said second plea described and set forth, which is now to the court here shown. And the said defendants, severing as aforesaid, say that in consideration of the said promise & undertaking of said Gruninger, & upon no other consideration, they and said Sherman agreed to pay him the said sum of three thousand dollars, and that to secure the payment of the said sum of three thousand dollars so agreed to be paid as aforesaid, for the consideration aforesaid, they, the said defendants and the said Sherman, gave the said Lawrence Gruninger the said promissory note in the first and second counts of the plaintiff's declaration set forth, which are one and the same note, and for no other consideration whatever. And the said defendants in fact say that, with the consent of the said Lawrence Gruninger, the said corporation was not formed as proposed in said first-mentioned agreement, and the said Lawrence Gruninger did not put into nor contribute towards the assets of such corporation the property of him, the said Lawrence Gruninger, in said writing
39 obligatory of him, the said Lawrence Gruninger, above-mentioned, but wholly refused so to do; and the said defendants say that the said property above-mentioned and described as being situated on the Blood Farm, in the county of Venango, and State of Pennsylvania, was then and there of small value, to wit, of the value of one dollar, and so the said defendants say that the consideration of said promissory note has in part failed, to wit, in the sum of two thousand nine hundred and ninety-nine dollars, and all interest thereon; and this they are ready to verify. Wherefore they pray judgment.

GOOKINS & ROBERTS,
Attorneys for Defendants Philpot & Picket.

(Endorsed:) Filed Jan'y 12th, '69. W'm H. Bradley, cl'k.

On this day, to wit, the 27th day of February, A. D. 1869, came said plaintiff, by her attorneys, and filed in said clerk's office her demurrer in said entitled cause, which said demurrer is in the words and figures following, to wit:

40 *Demurrer.*

United States, circuit court northern district of Illinois.

ALICE B. GRUNINGER, EXECUTRIX OF LAWRENCE GRUNINGER, deceased, *vs.* BRIAN PHILPOT, HENRY E. PICKET, & GEORGE J. SHERMAN. } Demurrers to pleas.

And the said plaintiff, as to the said plea of the said defendants Brian Philpot and Henry E. Picket by them thirdly above pleaded, saith that the same and the matters therein contained in manner and form as the same are above pleaded are not sufficient in law to bar the plaintiff of her aforesaid action against them, and that she is not bound by law to answer the same; and this she is ready to verify. Wherefore she prays judgment, &c.

And the said plaintiff, as to the said plea of the said defendants Philpot and Picket by them fourthly and above pleaded, saith that the same and the matters therein contained in manner and form as the same are above pleaded are not sufficient in law to bar the said plaintiff of her aforesaid action against them, and that she is not bound by law
41 to answer the same; and this she is ready to verify. Wherefore she prays judgment, &c.

And the said plaintiff, as to the said plea of the said defendants Philpot & Picket, by them fifthly above pleaded, saith that the same and the matters therein contained in manner and form as the same are above pleaded are not sufficient in law to bar the said plaintiff of her aforesaid action against them, and that she is not bound by law to answer the same; and this she is ready to verify. Wherefore she prays judgment, &c.

And the said plaintiff, as to the said plea of the said defendants Philpot and Picket by them sixthly above pleaded, saith that the same and the matters and things therein contained in manner and form as the same are above pleaded are not sufficient in law to bar the said plaintiff of her aforesaid action against them, and that she is not bound by law to answer the same; and this she is ready to verify. Wherefore she prays judgment, &c.

42 And the said plaintiff, as to the said plea of the said defendants Philpot and Picket by them seventhly above pleaded, saith that the same and the matters therein contained in manner and form as the same are above pleaded, are not sufficient in law to bar the said plaintiff of her aforesaid action against them, and that she is not bound by law to answer the same; and this she is ready to verify. Wherefore she prays judgment, &c.

HUTCHINSON & LUFF,
Pl'ff's Att'ys.

(Endorsed:) Filed Feb'y 27, 1869. W'm H. Bradley, cl'k.

On this day, to wit, the 8th day of May, A. D. 1869, in the adjourned May term in said year of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

Demurrer taken under advisement.

ALICE B. GRUNINGER, EXECUTRIX &C.,
vs.
BRIAN PHILPOT, ET AL.

Now come the parties, by their attorneys, and now comes on to be heard the demurrer of the plaintiff to the third, fourth, fifth,
43 sixth, and seventh pleas of the defendant filed herein; and, after hearing the arguments of counsel, the court takes the same under advisement.

On this day, to wit, the 28th day of May in the adjourned May term, A. D. 1869 of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

Demurrer sustained & leave to amend pleas.

ALICE B. GRUNINGER, EX'R, &C.,
vs.
BRIAN PHILPOT ET AL.

The court having considered and being now fully advised upon the demurrer of the plaintiff to the third, fourth, fifth, sixth and seventh pleas of the defendants filed herein, sustains said demurrer with leave to the defendants to amend their said pleas.

On this day, to wit, the 1st day of June, A. D. 1869, came said plaintiff, by her attorneys, *came* and filed in said clerk's office her replications in said entitled cause, which said replications are in the words and figures following, to wit:

44 *Replications.*

United States circuit court, nor. dist. of Ill. May term, 1869.

ALICE B. GRUNINGER, EXECUTRIX of LAWrence Gruninger, dec'd,
vs.
BRIAN PHILPOT, GEORGE J. SHERMAN, AND Henry E. Picket.

And the said plaintiff, as to the said plea of the said defendants Philpot and Picket by them secondly above pleaded, says precludi non; because she says that the said supposed agreement of said Lawrence Gruninger in said plea mentioned was not the only consideration of the said promissory note, and that said Lawrence Gruninger never had any notice that the said defendants were ready and willing to perform all the stipulations in said agreement set forth; and because she says that said Lawrence Gruninger did not neglect and refuse to become a party to said company, as in said plea alleged. And said plaintiff says that the consideration of said promissory note has not

wholly failed, as in said plea alleged; and this she prays may be inquired of by the country, &c.

And the defendants do the like.

GOOKINS & ROBERTS, *P. D.*

45 And the said plaintiff, as to the said plea of the defendants Philpot and Picket by them thirdly above pleaded, says precludi non; because she says that the said Lawrence Gruninger did not fraudulently or deceitfully propose to the said defendants that, in consideration that they and said Sherman would purchase from him a certain interest in oil lands in Venango county, Pennsylvania, and execute to him their promissory note therefor, he would become a party to the enterprise set forth in the agreement in said plea mentioned, as is in the said plea alleged, and that the said supposed agreement of said Gruninger was not the only consideration of the said note, as is in the said plea alleged. And the said plaintiff says that the said defendants were never in any manner deceived by the said Lawrence Gruninger in that behalf, and that the said promissory note was not obtained from them by fraud; and of this she puts herself upon the country, &c.

And deft's do the like.

GOOKINS & ROBERTS, *P. D.*

46 And the said plaintiff, as to the said plea of the said defendants Philpot and Picket by them fourthly above pleaded, says precludi non; because she says that the said supposed agreememt of the said Lawrence Gruninger in said plea mentioned was not the only consideration of the said note as is in the said plea alleged. And because she says that the said Lawrence Gruninger did not have notice of the formation of said company and did not refuse to enter into said company and contribute towards the assets thereof, as is in the said pleas alleged; and because she says that the said property described as being upon the Blood Farm in the county of Venango, and State of Pennsylvania, was not at the said time of no value. And she denies that the said Lawrence Gruninger had no title thereto to sell to the said defendants, and that the consideration of said note has wholly failed, as is in said plea alleged; and this she prays may be inquired of by the country, &c.

And the defendants do the like.

GOOKINS & ROBERTS, *P. D.*

47 And the said plaintiff, as to the said plea of the defendants Philpot and Picket by them fifthly above pleaded, says precludi non; because she says that the said supposed agreement of the said Lawrence Gruninger in said plea mentioned was not the only consideration of the said note, as in the said plea alleged; and because she says that the said Lawrence Gruninger did not have notice of the formation of said Company, and did not refuse to enter into the same and contribute to the assets thereof as is in the said plea alleged; and because she says that the property described as being upon the Blood Farm, in the county of Venango, and State of Pennsylvania, was at the said time of great value, to wit, of the value of more than one dollar, and the consideration of said note has not in part failed, as is in the plea alleged; and this she prays may be inquired of by the country, &c.

And defendants do the like.

GOOKINS & ROBERTS, *P. D.*

And the said plaintiff, as to the said plea of the defendants Philpot and Picket by them sixthly above pleaded, says precludi non; because she says that the said supposed agreement of the said Lawrence
48 Gruninger in the said plea mentioned, was not the only consideration of the said note, as is in the said plea alleged; and because she says that said Lawrence Gruninger did not refuse to contribute to the assets of said company, as is in the said plea alleged; and because she denies that the said property described as being situate on the Blood Farm, in the county of Venango, and State of Pennsylvania, was at the said time of no value, and that the consideration of said note has wholly failed; and this she prays may be inquired of by the country, &c.

And defendants do the like.

GOOKINS & ROBERTS, *P. D.*

And the said plaintiff, as to the said plea of the defendants Philpot and Picket by them seventhly above pleaded, says procludi non; because she says that the said supposed agreement of the said Lawrence Gruninger in said plea mentioned was not the only consideration of the said note, as is in said plea alleged; and because she says that the said Lawrence Gruninger did not refuse to contribute towards the assets of said company, as in the said plea is alleged; and because she says that the said property described as being situate on the Blood Farm, in the county of Venango, and State of Pennsylvania, was at the said time of great value, to wit, of the value of more than one dollar, and
49 that the consideration of said note has not in part failed, as is in the said plea alleged; and this she prays may be inquired of by the country, &c.

HUTCHINSON & LUFF,
Pl'ff's Att'ys.

And defendants do the like.

GOOKINS & ROBERTS, *P. D.*

(Endorsed:) Filed June 1, 1869. W'm H. Bradley, cl'k.

On this day, to wit, 1st day of June, A. D. 1869, came said defendant Sherman, by his attorneys, and filed in said clerk's office his pleas in said entitled cause, which said pleas are in the words and figures following, to wit:

Pleas of def't Sherman.

UNITED STATES OF AMERICA,
Northern District of Illinois:

In the circuit court.

BRIAN PHILPOT, GEORGE J. SHERMAN, & Henry E. Picket,
ats.
ALICE B. GRUNINGER, EXECUTRIX OF LAWrence Gruninger, dec'd.

50 And now comes the said defendant George I. Sherman, by Gookins

& Roberts, his att'ys, and says that the said plaintiff ought not to have or maintain her action aforesaid, because he says that the said promissory note in the first count of the declaration is the sole and only cause of action in said suit. That the sole and only consideration for the said note and the money therein mentioned was the sale, assignment, and transfer to the said defendants by the said Lawrence Gruninger, at time of the delivery of the said note by them to him, of his interest in the well on the Coombs Lease on the Blood Farm, in Venango County, Pennsylvania, said interest being one-eighth of the working interest or one-sixteenth of all the oil from said well. And the said Lawrence Gruninger then and there warranted to the defendants that he was the sole and lawful owner of the said interest, and had good right to sell, assign, and transfer the same to the defendants as aforesaid; and defendant Sherman says that, at the time when the said note was so made and delivered to the said Lawrence Gruninger for the consideration aforesaid, he, said Lawrence Gruninger, had not, nor has he at any time since had, any title to or interest in the said property so pretended to be sold, assigned, and transferred by him to defendants as aforesaid; and so this defendant says the consideration of said note has wholly failed; and this he is ready to verify. Wherefore he
51 prays judgment, &c.

And for a further plea, defendant Sherman says actio non; because he says the defendants did not undertake and promise in manner and form as the said plaintiff has above thereof complained against them; and of this he puts himself upon the country, &c.

And the pl'ff doth the like.

HUTCHINSON & LUFF,
Pl'ff's Att'ys.

And for a further plea in this behalf, defendant Sherman says actio non; because he says that the promissory notes mentioned in the declaration are one & the same note, and said note is the only cause of action herein; that the sole and only consideration for the said note and the promise of the defendant to pay the money therein mentioned, according to its tenor and effect, was the promise and agreement of the said Lawrence Gruninger to sell and convey to the said defendants one-eighth of the working interest, being one sixteenth of all the oil from an oil well on the Coombs Lease on the Blood Farm, situated in Venango County, Pennsylvania, which said property, he, the said Lawrence Gruninger, then and there claimed to own, and have lawful right to sell and convey to the said defendants, as aforesaid. And defendant says that, at the time of the making and delivery of the said note to the said
52 Lawrence Gruninger, and at the time of his said promise and undertaking to defendants as aforesaid, he, the said Lawrence Gruninger, did not own and did not have lawful right to sell and convey to said defendants the property by him to be sold and conveyed to them as aforesaid; and the said Lawrence Gruninger, since the time of making his said promise and agreement, and the said plaintiff, since his death, have never owned and had lawful right to sell and convey said property to defendants, according to the promise and undertaking of said Lawrence Gruninger as aforesaid; and so defendant says the consideration of the said note has wholly failed; and this he is ready to verify. Wherefore he prays judgment, &c.

And for a further and fourth plea, defendant Sherman says he craves oyer of the said letters testamentary, and they are read to him in these

words, (here set them out,) which, being read and heard, defendant says actio non; because he says the plaintiff is not executrix, in manner and form as she has alleged in her declaration; & this the defendant is ready to verify. Wherefore he prays judgment, &c.

And for a further and fifth plea, defendant says actio non; because he says the said promissory notes in said declaration counted on
53 are one & the same, and the sole & only consideration therefor; and the money therein mentioned was the sale, assignment, and conveyance, by the said Lawrence Gruninger to the defendants, of a leasehold estate, called & known as the Coombs Lease, being for a term of years in & of a certain parcel of land known as the Blood Farm, and lying in Venango County, Pennsylvania, the said estate so sold, assigned, & conveyed being further described and known as one eighth of the working interest, or one sixteenth of all the oil from a well on said land; and defendant says that, at the time of the said sale, assignment, and conveyance by the said Lawrence Gruninger to the said defendants of the property aforesaid, the said Lawrence Gruninger had, before then, to wit, on the 19th day of October, 1864, sold and conveyed by deed, under the hand and seal of him, the said Lawrence Gruninger, the property aforesaid to certain persons, to wit, B. Philpot and Henry E. Picket, who then held, and ever since have held, the legal title thereto, under and by virtue of the said deed; and so defendant says the consideration of the said note has wholly failed; and this he is ready to verify, &c.

54 And for a further and sixth plea, defendant Sherman says action non; because he says that the said several notes counted on in the said declaration are one and the same note, and the sole cause of action in this suit; and defendant says that, heretofore, to wit, on the 6th day of May, 1865, at Philadelphia, to wit, at said county, the said Lawrence Gruninger, in order to induce the said defendants to execute and deliver to him the said promissory note, undertook and then and there promised the said defendants that, in consideration that they would execute and deliver to him the said promissory note for $3,000, he would sell, assign, and convey to them the leasehold property mentioned and described in the fifth plea above; and, also put into a certain company then about to be incorporated under the laws of Pennsylvania, one-half of the working interest, it being one-fourth of all the oil in or to be produced from the lease and lot number eleven on the Smith Farm, Cherry Run, upon certain terms and conditions then agreed upon, to wit, on the said 6th day of May, 1865, at the county aforesaid; and defendant says that, relying upon the said promise and undertaking of the said Gruninger, in that behalf, as aforesaid, and upon no other consideration whatever, they, the defendants, did then and there execute and deliver to the said Gruninger the said promissory note.

55 And defendant says that, previous to the said sixth day of May, 1865, and previous to his said promise and undertaking, he, the said Lawrence Gruninger, had bargained, sold, and assigned by deed, under seal, the leasehold property in the said fifth plea above-mentioned, to certain persons, to wit, B. Philpot and Henry E. Picket, who then held, and have ever since continued to hold, the said title so assigned to them.

And defendant says that said Gruninger did not sell, assign, and convey to the said defendants the said leasehold property in said fifth plea mentioned, according to his said promise and undertaking, and did not put into the said company the said property, so to be by him put in as aforesaid, but neglected and refused so to do; and so, defendant says

the said consideration of the said note has wholly failed; and this he is ready to verify. Wherefore he prays judgment.

GOOKINS & ROBERTS,
For Def't.

(Endorsed :) Filed June 1, 1869. W'm H. Bradley, cl'k.

On the same day, to wit, the 1st day of June, A. D. 1869, came said plaintiff, by her attorneys, and filed in said clerk's office her replications in said entitled cause, which said replications are in the
56 words and figures following, to wit:

Replication to pleas of Sherman.

United States circuit court, nor. dist. of Illinois.

ALICE B. GRUNINGER, EX'X, &C.,
v.
BRIAN PHILPOT ET AL.

And the said plaintiff, as to the said plea of the defendant George J. Sherman by him sixthly above pleaded, says precludi non; because she says that the said supposed promise and undertaking of the said Lawrence Gruninger mentioned in said plea was not the only consideration of the said note, as is in said plea alleged; and because she denies that, previous to the said 6th day of May, A. D. 1865, the said Lawrence Gruninger had bargained, sold, and assigned, by deed under seal, the leasehold property in said fifth plea mentioned to said B. Philpot and Henry E. Picket, and that said Philpot and Picket have ever since continued to hold the said title, as is in the said plea alleged; and because she says that the said Lawrence Gruninger did convey to the said defendants the said leasehold property in said fifth plea mentioned, and that the consideration of said note has not wholly failed, as is in the said plea alleged; and this she prays may be enquired of by the country, &c.

HUTCHINSON & LUFF, *Pl'ff' Att'ys.*

And def't does the like.

GOOKINS & ROBERTS, *P. D.*

57 United States cir. court, nor. dist. of Illinois. May term, 1869.

ALICE B. GRUNINGER, EX'X of LAWRENCE Gruninger, dec'd,
vs.
BRIAN, PHILPOT, HENRY E. PICKET, & GEORGE J. Sherman.

And the said plaintiff, as to the said plea of the defendant George J. Sherman by him firstly above-pleaded, says precludi non; because she says that the sale, assignment, and transfer to the said defendants by the said Lawrence Gruninger, at the time of the delivery of the said note by them to him, of his interest in the well on the Coombs Lease, on the Blood Farm, said interest being one-eighth of the working interest, or one-sixteenth of the oil from said well, was not the sole and only consideration of the said note; and because she says that the said Lawrence Gruninger did not then and there warrant to the defendants that he was the sole and lawful owner of the said interest, and had good right to sell, assign, and transfer the same to the defendants, as in said

plea alleged; and because she denies that the said Lawrence Gruninger had no title to the said interest, as is in said plea alleged. And the said plaintiff says that the consideration of said note has not wholly failed, as in the said plea alleged; and this she prays may be inquired of by the country, &c.

And defendant does the like.

GOOKINS & ROBERTS, *P D.*

58 And the said plaintiff, as to the said plea of the defendant George J. Sherman by him thirdly above-pleaded, says precludi non; because she says that the said supposed agreement of the said Lawrence Gruninger to sell and convey to the said defendants the said interest in an oil well on the Coombs Lease, on the Blood Farm, was not the sole and only consideration of the said note, as in the said plea alleged; and because she denies that the said Lawrence Gruninger, at the said time when, &c., claimed to own and have lawful right to sell the said interest to said defendants, as is in the said plea alleged; and because she says that, at the time of the making and delivery of said note, the said Lawrence Gruninger did have lawful right to convey the said interest to said defendants, and that the consideration of the said note has not wholly failed, as is in the said plea alleged; and this she prays may be inquired of by the country, &c.

And def't does the like.

GOOKINS & ROBERTS, *P. D.*

And the said plaintiff, as to the said plea of the defendant George J. Sherman by him fourthly above-pleaded, says precludi non; because she says that she is executrix in manner and form as she has alleged
59 in her declaration; and this she prays may be inquired of by the country, &c.

And def't does the like.

GOOKINS & ROBERTS, *P. D.*

And the said plaintiff, as to the said plea of the defendant George J. Sherman by him fifthly above-pleaded, says precludi non; because she says that the sale, assignment, and conveyance, by the said Lawrence Gruninger to the defendants of the said Coombs Lease, was not the sole and only consideration for the said promissory notes counted on in said declaration, as is in the said plea alleged; and because she denies that, at the time of the said sale, assignment, and conveyance, by said Lawrence Gruninger to said defendants of said property, the said Lawrence Gruninger had before then sold and conveyed, by deed under his hand and seal, the property aforesaid to B. Philpot and Henry E. Picket, and that said Philpot & Picket then held and have ever since held the legal title thereto under or by virtue of such deed, and that the consideration of said note has wholly failed, as is in the said plea alleged; and this the said plaintiff prays may be inquired of by the country, &c.

HUTCHINSON & LUFF,
P'ff' Att'ys.

And def't does the like.

GOOKINS & ROBERTS, *P. D.*

(Endorsed:) Filed June 1, 1869. W'm H. Bradley, cl'k.

60 On this day, to wit, the 17th day of June, in the adjourned May term, A. D. 1869, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

Leave to amend replic' to plea of Sherman.

ALICE B. GRUNINGER, EXECUTRIX, &C., *vs.* BRYAN PHILPOT. } Assumpsit.

On motion of the plaintiff, by his attorney, leave is given him to amend his replication to the third, fifth, and sixth pleas of the defendant George J. Sherman.

On this day, to wit, the 29th day of October, in the adjourned October term, A. D. 1869, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

Leave to amend dec., &c. Hearing cause.

ALICE B. GRUNINGER, EXECUTRIX, &C., OF Lawrence Gruninger, deceased, *vs.* BRIAN PHILPOT, GEORGE J. SHERMAN, AND Henry E. Picket. } Assumpsit.

Now come the parties, by their attorneys, and on motion of the plaintiff, by her attorney, leave is given her to amend her declaration by making the ad damnum therein, in the sum of six thousand dollars; and, on motion of the defendants, by their attorney, leave is given them to
61 withdraw the second and fourth pleas of the defendant George J. Sherman, and also the first plea of the general issue of the defendants Brian Philpot and Henry E. Picket, and upon issue joined thereupon come a jury of good and lawful men, to wit: S. B. Deane, J. A. Sturges, T. B. Bridges, Jesse Ruger, A. Bebee, George W. Cleveland, John Gagee, Orren Wheaton, Joseph Smith, B. L. Rae, H. C. Newell, and Warren Hill, who were all duly elected, tried, and sworn, well and truly to try said issue; and, after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

On this day, to wit, the 30th day of October, in the adjourned October term, A. D. 1869, of said court, in the record of the proceedings thereof in said entitled cause is the following entry to wit:

Hearing continued.

ALICE B. GRUNINGER, EXECUTRIX, &C., *vs.* BRIAN PHILPOT, GEORGE J. SHERMAN, AND Henry E. Pickett. } Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury, in this behalf empannel'ed and sworn; and, after hearing the concluding evidence and a part of the arguments of counsel, the hour of adjournment having arrived, the further trial of the cause
62 is postponed until Monday morning next.

On this day, to wit, the 1st day of November, in the adjourned October term, A. D. 1869, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

Hearing continued.

ALICE B. GRUNINGER, EXECUTRIX OF LAWRENCE Gruninger, deceased,
vs.
BRIAN PHILPOT, GEORGE J. SHERMAN, AND Henry E. Pickett. } Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury, in this behalf empannel'ed and sworn; and, after hearing the concluding arguments of counsel and receiving the instructions of the court, the jury retire to consider of their verdict, and, by agreement of the parties, by their attorneys, the jury, when they shall have agreed upon a verdict, may sign and seal the same, and deliver it to the clerk and disperse.

On this day, to wit, the 3d day of November, in the adjourned October term, A. D. 1869, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

63 *Verdict.*

ALICE B. GRUNINGER, EXECUTRIX OF LAWRENCE Gruninger, deceased,
vs.
BRIAN PHILPOT, GEORGE J. SHERMAN, AND Henry E. Pickett. } Assumpsit.

The jury, in *in* this behalf empan'elled and sworn, this day return into court their sealed verdict, wherein they say: We, the jury, find the issue for the plaintiff, and assess her damages to the sum of thirty-seven hundred and seventy-five dollars.

And thereupon the defendants, by their attorney, moved the court for a new trial herein.

On this day, to wit, the 11th day of November, A. D. 1869, came said defendants, by their attorneys, and filed in said clerk's office their motion for a new trial in said entitled cause, which motion is in the words and figures following, to wit:

Motion for a new trial.

In the circuit court of the United States, Oct. term, 1869.

ALICE B. GRUNINGER
vs.
BRYAN PHILPOT ET AL.

And now come the defendants, by Gookins & Roberts & Rogers,
64 and file the following grounds for a new trial:

1. The court erred in overruling the motion of defendants for leave to open and close the case to the jury.

2. The court erred in excluding from the jury the articles of co-partnership of Philpot, Sherman & Co., dated November 8th, 1864.

3. The court erred in withdrawing from the consideration of the jury the issues presented by the 6th plea of defendant Sherman, which were traversed by the plaintiff.

4. The court erred in refusing to charge the jury that the writing signed by the decedent, Lawrence Gruninger, & B. Philpot & H. E. Picket, dated October 19th, 1864, for the sale of well No. 2, Blood Farm, &c., was a valid assignment of the interest of the said Gruninger in the term, and that, on the 6th of May, 1865, when he sold the said term to defendants, he had no legal title thereto; and that the deed of said last-mentioned date did not convey to defendants the legal title thereto; and that the conveyance of such legal title by the said Gruninger to defendants was a condition precedent to his right to receive upon the note sued on herein.

65 5. The court erred in refusing to charge the jury that, upon the evidence adduced in the cause, the said Gruninger had not conveyed to defendants the legal title to the leasehold interest of said term pretended to be conveyed by the said deed of May 6th, 1865.

6th. That the verdict was contrary to the law & the evidence.

7th. That, upon the evidence, the verdict should have been for the defendants.

GOOKINS & ROBERTS,
Att'ys.

(Endorsed:) Filed Nov. 11, 1869. W'm H. Bradley, cl'k.

On this day, to wit, the 17th day of December, in the adjourned October, term, A, D. 1869, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

Judg't.

ALICE B. GRUNINGER, EXECUTRIX OF LAWRENCE Gruninger, deceased, *vs.* BRIAN PHILPOT, GEORGE J. SHERMAN, AND Henry E. Pickett. } Assumpsit.

66 Now come the parties, by their attorneys, and now comes on to be heard the motion of the defendants heretofore entered for a new trial of this cause; and, after hearing the arguments of counsel, the court overrules said motion.

It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendants the said sum of thirty-seven hundred and seventy-five dollars, her damages so as aforesaid assessed, together with her costs and charges by her about her suit in this behalf expended, amounting to the sum of one hundred seventeen dollars and eighty-five cents, and that she have execution therefor.

On the hearing of said cause the following exceptions were taken and were allowed by the court and made of record, and are in the words and figures following to wit:

67 *Bill of exceptions.*

United States circuit court, northern district of Illinois, October term, 1869.

ALICE B. GRUNINGER, EXECUTRIX OF LAWRENCE Gruninger, dec'd,
vs.
BRIAN PHILPOT, GEORGE J. SHERMAN, & Henry E. Picket. } Assumpsit.

Be it remembered that, on the trial of this cause, the plaintiff gave in evidence a promissory note, signed by the defendants, as follows:

Philpot, S. & Co.' note.

PHILAD'A, *May 6th*, 1865.

On demand, we promise to pay Lawrence Gruninger or order, three thousand dollars, for value received.

$3,000. PHILPOT, SHERMAN & CO.

[Int. rev. stamp, $1 50, cancelled.]

The plaintiff also gave in evidence the letter of Philpot, Sherman & Co., written by the defendant Picket, the defendant's signature being proved, dated at Titusville, Pa., July 5, 1865, as follows:

68 *P., S. & Co.'s letter of July 5, '65.*

[Real estate brokers and oil-land agents, Titusville, Pa. Office over the Petroleum Bank. Branch office, No. 142 South 4th street, Philadelphia.]

OFFICE OF PHILPOT, SHERMAN AND CO.,
Titusville, Pa., July 5th, 1865.

Capt. L. GRUNINGER.

DEAR SIR: Mr. Madison, of the Petroleum Bank, has not yet heard of the payment of the note you gave him, payable in New York some time last month. If you have not paid it, you must attend to it at once, as the bank are boring me a good deal about it. We have learned that the note given you by our firm has been sent to Philadelphia for collection. All I can say is, we are, at present, unable to pay it. The change in times has so contracted our means as to make it doubtful if we are able to pay your note in cash at all.

69 We will be glad to settle with you by letting you have some good property any time; but money, at the present time, is out of the question with us. Let us hear from you soon.

Yours, truly,

PHILPOT, SHERMAN & CO.

The plaintiff here rested.

And thereupon the defendants, to maintain the issues on their behalf, introduced and gave in evidence to the jury the letter of Laurence Gruninger to the defendants, dated July 7, 1865, having proved to the jury that the same was in the handwriting of the said Gruninger, which letter is as follows, to wit:

Gruninger letter of July 7, '65.

ATTLEBORO', *July 7th*, 1865.

PHILPOT, SHERMAN & Co.

GENTLEMEN: Yours of July 5th was also received, with one of same date. You write me that the note given by you to me was presented to you by a collector for payment, & you think it a very strange proceeding. I myself can't see anything strange in it. You can't
70 say that I have not acted as a gentleman with you. You know that the note ought to have been paid *these* long time. The note you gave me you promised to *paid* in one month's time; that would have been June 6th, and it is now July 7—*there* is over the time you promised to pay the note. I am in need of money. I have to pay away eight thousand dollars in course of fifteen day', and mus' have the money. I am sorry to see you mention in your letter about a contract I assign' to you, & you would reccommend me to withdraw that note as soon as convenient, when a satisfactory adjustment of the whole can be made; and, if I push that note, you shall demand that interest which, you say, you have me bound for, & proseed accordingly. If you think *these* languag' or *these* kind of talk goes with me, you better try it. I am sorry that you have *wrote* so, & the note I have given to collect, & mus' & shall be collected if——

I am sorry to answer you in *these* way, but you commenced it.

Yours, respectfully,

L. GRUNINGER.

71 And thereupon the said defendants introduced and read to the jury a letter from the defendants to the said Laurence Gruninger, dated July 5, 1865, and proved to the jury that said letter was in the handwriting of the defendant Philpot, which letter is as follows:

Letter of P., S. & Co. of July 5th, '65.

PHILAD'A, *July 5th*, '65.

L. GRUNINGER, Esq'r.,
Attleboro', Mass.

DEAR SIR: The note given by me to you has been presented by a collector for payment. We think a very strange proceeding under the circumstances the note was obtained, and a part having been paid. We have your name to a contract assigning us your interest in well No. 11, on the Smith Farm, and we would reccommend that you withdraw that note, and, as soon as convenient, meet us in Philad'a, when a satisfactory adjustment of the whole can be arrived at.
72 If you push that note, we shall assuredly demand that interest which we have you bound for, and proceed accordingly. We shall leave for Titusville next Wednesday evening. We think if you will meet us here on Wednesday next the matter can be settled.

We leave here on Friday next, to be absent till Tuesday night; so, if you conclude to come, arrange to meet us here on Wednesday of next week.

Yours, truly,

PHILPOT, SHERMAN & CO.

The defendants then gave in evidence to the jury the agreement of April 21, 1865, with the agreement, under seal of the said Laurence

Gruninger, appended thereto, dated May 6, 1865, having proved the execution thereof by the parties signing the same, respectively, which are as follows:

Agreement of April 21st, '65.

This agreement, made this 21st day of April, 1865, between Prince & Irwin, Philpot, Sherman & Co., and E. C. Bradley & Bro., all of
73 Titusville, Venango County, Pennsylvania, witnesseth:

That the said parties covenant and agree with each other to furnish the hereinafter-mentioned properties at the prices thereto attached, for the purpose of forming a stock company, the name and style of which shall be hereafter determined on.

Prince & Irwin agree, on their part, to furnish and put into said company the following interests, to wit:

[5-ct's U. S. rev. stamp, cancelled.]

$\frac{1}{24}$ working interest—$\frac{1}{48}$ of the oil in the Lady Washington Well, and lease on the Blood Farm, producing about 65 barrels.

$\frac{1}{16}$ working interest—$\frac{1}{32}$ of the oil in the Demming Well, and lease on the John McClintock Farm, producing 25 barrels.

$\frac{1}{16}$ working interest—$\frac{1}{32}$ of the oil in the Follett Well, & lease on the McClintock Reserve; said well drilled and ready for testing.

$\frac{1}{8}$ working interest—$\frac{1}{8}$ of the oil in the Irwin Well, & lease on the McClintock Reserve, producing 30 barrels.

74 $\frac{1}{32}$ working interest—$\frac{1}{64}$ of the oil in the Amazon Well, and lease on the Smith Farm, producing 40 barrels, with one other well going down.

$\frac{1}{4}$ working interest—$\frac{1}{4}$ of the oil in well and lease No. 11, Smith Farm, producing 50 barrels.

The price at which the above interests are to be put into the joint property of the company, is to be $52,000.

Philpot, Sherman & Co. agree, for their part, to furnish and put into said company the following properties, to wit:

$\frac{1}{8}$ land interest in the James A. Stevenson Farm, one well going down, 98 acres.

$\frac{1}{4}$ land interest in 5 acres of the Pit Hole Farm, known as the Reynold's Farm, being some five acres sold by them to Andrews & Byers, upon which two wells are to be put down at once. 10 acres in fee, part of Reynold's farm.

4$\frac{1}{4}$ acres in fee, part of the farm known as the Ackerman Farm, on Cherry Run, subject to a reservation of $\frac{1}{20}$ of the oil to the original
75 proprietors.

The price at which the above interests are to be put into the joint property of the company, is to be $50,000.

E. C. Bradley & Bro. agree for their part to furnish and put into said company the following properties, to wit:

$\frac{1}{16}$ working interest—$\frac{1}{32}$ of the oil in the Fee Well, and lease No. 9, on the Smith Farm, now producing about 20 barrels per day, & one other well going down, to be completed free of expense to the company.

$\frac{1}{4}$ working interest—$\frac{1}{8}$ of the oil in three wells, and leases Nos. 9, 16, & 21, on the Jno. McClintock Farm; said wells now going down and to be completed and tested free of charge to the company.

$\frac{1}{4}$ of the oil-land interest in two half-acre leases on McClure Farm, Nos. 7 & 8 on Cherry Run. Two wells going down.

$\frac{1}{16}$ free interest—$\frac{1}{32}$ of the oil in lot No. 18, McFate Farm, 60 rods above Smith Farm, on Cherry Run. Well down 600 feet, & two wells going down.

[5cts. rev. stamp, cancelled.]

76 The price at which the above interests are to be put into the joint property of the company, is to be $32,000, making in all, as the cost price of the property to be put in, $154,000; each party is to furnish necessary plans, surveys, briefs of title and conveyances at their own proper costs and charges. It is agreed that Philpot, Sherman & Co. are to take charge of the property, and to get a charter and take all proper and necessary steps for the formation of the company and procuring subscriptions to the stock of the same, in which the other parties are to assist so far as they may be able.

The parties putting in producing interests are to retain the production until the sum of worth of the stock shall be sold, and the proceeds divided as hereafter mentioned, and then the production is to be turned over to the company.

The par value of the shares of stock, and the subscription price for the same shall be $5, and the capital stock shall be 60,000 shares, of
77 which 5,000 shares shall be reserved for a working capital. As fast as the stock shall be sold and the money realized the same shall be divided pro rata among the parties hereto, and after all expenses of procuring the charter and other necessary expenses & commissions shall have been paid, the entire profits are to be divided among the several parties hereto pro rata according to the several amounts put in by each, whether the said profits shall be in cash or in stock of the company.

The election of directors and officers of the company, and the full organization of the same, is postponed for further consideration and agreement, and it is understood that if there shall be a failure to make sale of sufficient stock to justify the organization of the company, then the interests and properties are to revert to their respective owners, and each party is to pay *their* pro rata share of the expenses incurred.

In witness whereof the said parties have hereto set their hands and seals the day & date first above written.

78 PRINCE & ERWIN.
PHILPOT, SHERMAN & CO.
E. C. BRADLEY & BROTHER.

Witness:
GEO. C. DAY.

PHILAD'A, *May 6th*, 1865.

It is agreed this day that Lawrence Granninger is to put into this company one-half the working interest, it being one-fourth of all the oil in or to be produced from the lease and lot No. 11, on the Smith Farm, Cherry Run, on the same terms and conditions that the balance of the parties furnish their several properties, and also to take the same portion and pro rata of profits in the said company, at and for the sum of thirty thousand dollars.

LAURENCE GRUNINGER. [L. S.]

[5ct. rev. stamp, cancelled.]

79 The defendants then gave in evidence the deposition of Justin B. Bradley, as follows:

Deposition of J. B. Bradley.

Deposition of JUSTIN B. BRADLEY, taken October 4th, A. D. 1869, before S. W. Burnham, esq., U. S. commissioner at Chicago, Illinois, on behalf of defendants.

1. Q. What is your name, age, residence, and occupation?

80 A. Justin B. Bradley; will be 43 years of age next December. I don't know my occupation exactly; farmer or drover. I used to be an oil operator. I live in S , Crawford County, Pa.

2. Q. What was your business during the years 1864 and 1865?

A. I was operating in oil; buying and selling.

3. Q. Where?

A. In the fore part of 1864 I was in Canada, and along in August, I guess, I came home, and went down to Titusville, and lived there, and operated on Oil Creek.

4. Q. Had you or not a partner in your business during the year 1865; and if so, who was your partner?

A. My brother, and myself and a man by the name of Nelson operated together in some things, and my brother and myself in everything.

5. Q. What was your brother's name?

A. Edwin C.

6. Q. State whether or not you and your brother were partners on the 21st of April, 1865; if so, what was the style of your firm?

A. We called our firm Bradley & Bro.

81 7. Q. What was the business of your firm then?

A. We were operating—buying and selling real estate, putting down wells.

8. Q. Where?

A. The heft of our well-operations was on Cherry Run.

9. Q. What county and State?

A. Venango Co., Pa.

10. Q. Look at the writing now shown you, purporting to be an agreement made the 21st of April, 1865, between Prince and Irwin, Philpot, Sherman & Co., and E. C. Bradley and Bro., of Titusville, Venango Co., Pa., witnessed by George C. Duy, to which is appended, partly on the same paper, and partly on another piece of paper, an agreement, dated Philadelphia, May 6th, 1865, signed and sealed by Lawrence Gruninger, by which it appears that the said Gruninger is to put into this company one-half of the working interest, which being one-fourth of all the oil in or to be produced from the lots or lot No. 11 on the Smith Farm,

82 Cherry Run, on the same terms and conditions that the balance of the parties furnished their several properties, and also to take the same portion and pro rata of profits in the said company, at and for the sum of $30,000; and state what, if anything, you know about the execution of the said agreement by Prince, Irwin, Philpot, Sherman & Co., and E. C. Bradley & Bro., on the 21st of April, 1865, and also what you know of the execution by Laurence Gruninger of the said agreement appended thereto?

A. I suppose this is the paper; it looks very much like it, what I signed.

11. Q. What signature did you put to that paper?

A. I put *that* on *there.*

12. Q. Read it.

A. E. C. Bradley & Bro. I put it there on account of—when they wrote it they wrote it a little different.

13. Q. When was that agreement executed by you for E. C. Bradley & Bro.?

A. It was done the date of this agreement, I suppose. It has been so long since I have forgotten. I could not tell exactly.

83 14. Q. Did any other persons or parties execute at the same time that you did?

A. Yes, sir.

15. Q. Who?

A. Mr. Prince and Irwin, and Philpot, Sherman & Co.

16. Q. Where was it so executed?

A. I had got the impression that it was done when we were down there; but I guess it was in Titusville, Pa.

Q. State what, if anything, you know of the execution thereof by the said Lawrence Gruninger?

A. I know we went to Philadelphia to meet him, and he didn't get there when we expected. Either Prince telegraphed for him, or Mr. Philpot; I could not say which. I rather think it was Prince telegraphed for him to meet us there.

18. Q. State whether or not you met Laurence G'uninger in Philadelphia; and if so, when and where?

A. We met him at Mr. Philpot and Sherman's office, in Philadelphia. I could not say, to the day, we met him.

84 19. Q. About when?

A. It must have been somewhere after the date of this, and before the date of the other.

20. Q. Do you mean after the 21st of April?

A. Yes, sir; and before the 6th of May following; he came then, and there was a good deal of talk.

21. Q. Wait. State whether you were present at the office of Philpot, Sherman & Co., in Philadelphia, at or about the 6th of May?

A. I was.

22. Q. And state who was there present at that time.

A. There was Prince and Irwin, Mr. Philpot and Sherman, Mr. Gruninger, myself, and , I think his name was Barnes.

23. Q. Was Barnes the clerk of Philpot, Sherman & Co.?

A. I think so.

24. Q. State the conversation that then occurred in the presence and hearing of Mr. Gruninger between Philpot and Sherman and Prince and Irwin and yourself.

(Objected to.)

85 A. I don't know as I really get the meaning of your question.

25. Q. State any conversation that you then and there heard between Gruninger and Philpot and Sherman, or either of them, if you remember any.

A. At the time that Mr. Gruninger came there, there was a good deal of talk, backwards and forwards, about going into this company that we had started there to form, and he (Gruninger) said that there had been an old trade of some kind or other that he wanted pay for. Mr. Philpot and Sherman finally agreed that, if he would put his property in, as the talk was, they would pay him $3,000, or give him a note for $3,000, to settle up some old matters; it was some well. I heard them talking about it. I could not tell where the well was.

26. Q. If he would put what property in?

A. His interest in well No. 11, I think it was, and I think there was some other property.

27. Q. Put it in where?

86 A. Into Philpot, Sherman & Co.—into the joint stock company that we were talking of getting up.

28. Q. State whether or not anything was then said by Philpot or Sherman to Gruninger about the character of this well, which Gruninger was claiming pay for; and if so, what was said.

A. I don't know as I could tell you; I got the impression that the well was not good for anything, some way; whether it was from what was said there or not.

29. Q. I only want the talk there, not outside.

A. I don't know that I ever said a word to Gruninger about the well or not.

30. Q. State whether or not Mr. Gruninger, after that conversation, signed this agreement?

A. He did.

31. Q. State whether or not, at that time, Philpot, Sherman & Co. gave him their note for $3,000?

A. I think they did.

32. Q. State what the consideration of that note was, as you
87 then understood it, from the conversations.

(Objected to.)

33. Q. I mean from conversations between Gruninger and Philpot and Sherman?

(Objected to so far as the understanding of the witness is concerned.)

A. I understood it to be settling up some old trade they had made before by some of the parties; I could not tell who.

34. Q. Were you one of the owners of well No. 15, Cherry Run?

A. Yes, sir—Smith Farm.

35. Q. Who were the other owners of the well?

A. My brother and myself, and a man by the name of Anderson, and Prince and Irwin owned one-half of the working interest, and Gruninger, and I think a man by the name of Thompson, owned the other half.

36. Q. State what was the value of Gruninger's half of that well about the 18th or 19th of October, 1864.

A. We considered, when we sold our half, that we got a big price for it.

37. Q. What did you sell your half for, and when?

88 A. The day I could not tell; it was the same day the transaction was made with Gruninger; I think we got $60,000 or $62,000, I could not say which, for our half.

38. Q. Was or not that the fair or less than the fair market value of the half at that time?

A. I considered it a big price.

39. Q. State whether or not at that time, the firm of Philpot, Sherman & Co. had been formed?

A. The impression I would have is that it was not.

40. Q. What did you derive that impression from?

A. We had transacted there business with Sherman, and also with Picket.

41. Q. Was or not Pickett, about the 18th or 19th of October, operating for himself in wells?

A. I suppose he was, until after that; what time they were in the partnership, I could not say.

42. Q. At the time that you sold your half of this well No. 15, above-
89 mentioned, did you then understand that you were then selling to Philpot, Sherman & Co.?

A. I understood we were selling to Pickett.

43. Q. Were you not present at a conversation between Gruninger and Picket, with reference to the payment, by Picket to Gruninger, of some part of the purchase-money for Gruninger's half of this well, No. 15?

A. I was up there when he came down about the time the last payment was due on No. 15, and Mr. Picket wanted a few days' extension on it, and finally, I think, Picket paid him three thousand dollars; it might have been $5,000; I think it was $3,000; they agreed that if he paid him in four or five days the balance of it, that $1,000 should go on the purchase-money, and $2,000 as a bonus to wait these four or five days.

44. Q. Was anything then said, in that conversation between Picket and Gruninger, about the sale of well No. 2, Blood Farm?

A. I don't remember of anything being said about it.

90 45. Q. State whether or not you heard Gruninger at that time demand any pay for that well No. 2, from Picket?

A. I can't remember as I do.

46. Q. State whether or not Gruninger became a party to this company that was to be formed according to this agreement, dated May 6th, to which you have referred.

A. I don't think he ever did.

47. Q. If he did, would you have known it?

A. I should have been apt to.

48. Q. Do you know why he did not?

A. I never knew why he didn't.

49. Q. Do you know whether a company was actually formed?

A. There was.

50. Q. Do you know who prepared the papers for the formation of the company?

A. I think his name was Bonsdell—a lawyer in Philadelphia.

51. Q. Were you in Philadelphia the time the company was being got up?

A. Yes, sir.

52. Q. Was Mr. Gruninger there?

91 A. He came there while we were there.

53. Q. Was Gruninger there after the 6th of May, 1865?

A. I could not say. I could not remember the dates. I know he came back pretty soon after that was signed; I guess the next morning. Whether he was there after that, I don't know.

54. Q. Were you acquainted with the values of the several pieces of property mentioned in that agreement of April 21st, 1865, and May 6th, 1865?

A. Well, I was pretty well acquainted with most of it.

55. Q. Were you acquainted more particularly with the property that was agreed to be put in by Philpot, Sherman & Co., and by Gruninger?

A. Well, I was more acquainted with this well, No. 11, than I was with Sherman & Co.'s property.

56. Q. State whether or not, in a pecuniary point of view, Philpot, Sherman & Co. would have found it to their interest to pay Gruninger $3,000 as a bonus or consideration for becoming a party to the

92 agreement referred to, according to its terms.

(Objected to as irrelevant and incompetent.)

A. I considered a producing interest an advantage to the company. This was a producing interest of Gruninger's.

57. Q. State whether or not, in a pecuniary point of view, Philpot, Sherman & Co. would have found it to their advantage to pay Gruniu-

ger $3,000 as a bonus or consideration for becoming a party to the agreement referred to, according to its terms.

(Objected to.)

A. I considered that it was an advantage.

58. Q. Will you look at the pieces of property described in the agreement which Philpot, Sherman & Co. were to put in.

A. I don't know that I know all these pieces. I know pretty near where they are.

59. Q. Were any of them operating wells at that time?

A. Some were going down, but how many I didn't know.

93 60. Q. Were they yielding?

A. No, sir; I think not.

61. Q. How far did you live or have your place of business from this well No. 2, referred to?

A. It is probably about two miles. It might be a little trifle over.

62. Q. Did you know the value of that well No. 2 at that time?

(Objected to.)

A. No, sir—that is on the Blood Farm; no, sir.

63. Q. At the time of this conversation at the office of Philpot, Sherman & Co., which you have referred to, between Philpot, Sherman, and Gruninger, state whether or not Mr. Picket was there or in the city of Philadelphia at that time.

A. Mr. Picket was never in Philadelphia when I was there at their office.

(By stipulation the agreement in writing, heretofore referred to, is allowed to be retained by the counsel for the def't and produced at the trial of this cause, with the same effect as if the same were annexed to this deposition.)

94 Cross-examination by Mr. Hutchinson:

64. Q. Did you know the def't Sherman in the fall of 1864?

A. Yes, sir.

65. Q. Where was he living at that time?

A. In Titusville, I believe.

66. Q. Is he living there now?

A. Yes, sir.

67. Q. Has he been living there ever since the fall of 1864?

A. He has been in Erie, N. Y., and I don't know where all.

68. Q. How long has he been living in Titusville?

A. The last time?

69. Q. Yes.

A. I think he went there a year ago, in April or May.

70. Q. What is his business?

A. He is an oil operator.

71. Q. Whereabouts in Philadelphia was the office of Philpot, Sherman & Co., where you met Capt. Gruninger?

A. I don't know as I could just tell, now, the number and street.

72. Q. Had you ever met Capt. Gruninger before?

95 A. I had seen him when he lived there on the creek; not to be intimately acquainted with him.

73. Q. Did you see him more than once during the day of the 6th of May, 1865?

A. My impression is that he was there in the forenoon and afternoon both.

74. Q. How much of the day were you at the office of Philpot, Sherman & Co. during the 6th of May?

A. I could not tell you particularly. I went in there and talked. Some of them proposed to go to the billiard room, and I guess we played billiards some time. I went back to the office again.

75. Q. Did you see Capt. Gruninger during any part of the day, except when you were in the office?

A. I think that we all went—Philpot, Irwin, Prince, Gruninger, and myself all went to the billiard room.

76. Q. How much of the time were you with Capt. Gruninger that day?

A. Probably half the time.

77. Q. How much of the time with Philpot, Sherman & Co.

96 A. I think when we were there we were all together. I think I staid as long as they did.

78. Q. Were you during the entire day with Philpot & Co., or with Philpot?

A. I dont know; in the office I was. Irwin, and myself and Prince boarded at the Continental, I think it was. I don't know where Gruninger boarded.

79. Q. How was their office arranged? Was there more than one room?

A. They had two rooms, I believe.

80. Q. Where was this contract signed; which room?

A. In the front room, where they *done* their writing.

81. Q. What was the back room for?

A. There was a little room that they could get back in and talk to people that they wanted to.

82. Q. Did they go in with Capt. Gruninger during the day?

A. I don't think they did.

83. Q. They might have done so, I suppose.

A. They might—yes, sir—it was a transaction that partiularly didn't interest me, and I was not probably so particular as I should

97 have been, if it had been; they made no bones of talking it over when I was there.

84. Q. Do you recollect of Gruninger insisting on that old contract being settled before signing the agreement?

A. Yes, sir, before he would; some old trade to be finished up before he would put this in; they finally agreed that if he would put his property in, they would give him $3,000, or a note for it, payable at the end of a few days.

85. Q. For the old interest?

A. That was for the old interest, provided he would go into the new arrangement.

86. Q. Did he not want they should pay him the money at that time for this old interest?

A. It seems as though there was a talk of his wanting his money. They said they would give him a note payable in a few days.

87. Q. He refused to have anything to do with the company till that old claim was settled?

A. That is the way I understood it; they made one trade of it, as I understood it. They gave this note for the sake of having him

98 go in with them into the company; they considered it was not worth anything. They bought the well on representations, as I understood it by their talk backwards and forwards. They found out that the well was not good for anything, nor never had been.

88. Q. That is what they represented?

A. Yes, sir.

89. Q. Do you recollect which was signed first, the note or the agreement?

A. I could not tell you. It was all done there, one sitting any way. Which was signed first I could not say.

90. Q. Was there anything said about it being a compromise settlement of this old claim?

A. Well, that is what I took it from, that they settled up old matters, and agreed to pay him that for his agreeing to go into the company.

91. Q. Was there any representations made at the time as to the advantages of putting his property into the company?

A. I think there was. I think they talked about wanting a producing interest. They had a little interest, and my brother and I
99 had, and the interest that Prince and Irwin had in this same well by getting this in, made quite a little dividend for the company.

92. Q. Do you recollect what the particular advantages were, of that company?

A. That would be by their being able to pay a dividend right along on the stock—a small dividend.

93. Q. Was anything said about parties retaining the product of their interest till they got pay for their interests?

A. I don't think there was.

94. Q. Did you expect to put your interest in absolutely?

A. Yes, sir.

95. Q. Without retaining the products at all?

A. Yes, sir; I supposed the others would.

96. Q. You have spoken of a company having been formed; did you go into the company?

A. Yes, sir; I paid some money towards the expenses any way.

97. Q. Did you put in any of your interests?

A. Yes, sir.

98. Q. Were they producing interests?

A. One well was producing.

99. Q. Did you put that in absolutely?

100 A. They finally after they did'nt put this property in, they used the old charter. Sherman, Picket, Prince, and Irwin used that, and made another company, finally; they used the charter we had got. Our property was not put in—not when the company was finally formed.

100. Q. You say a charter was actually obtained?

A. Yes, sir; we got a lawyer there to fix out our papers, and we got a charter.

101. Q. Did you put your property in?

A. When they finished we did'nt put ours in; we put our property in at the start, and I paid my share of the money, and when they came finally to make the company we did'nt put ours in.

102. Q. Then you did'nt put your property into the company that was actually formed?

A. No, sir.

103. Q. Why did'nt you put it in?

A. I can't hardly tell you why; I was not down there when the last one was formed; they paid me back my money that I had given.

101 104. Q. They paid you back your money?

A. Yes, sir; my expense money. I supposed, as Gruninger didn't put his money in—

(Objected to.)

105. Q. Never mind that. Do you know whether there was any producing interest put into the company that was actually formed?

A. Prince and Irwin's part of the well was put in; that was producing interest.

106. Q. Did they retain the product?

A. I think not.

107. Q. Was any other producing interest put in, do you know—into the company that was formed?

A. I don't know whether I ever saw the schedule after they finally made it or not.

108. Q. Do you know a man by the name of J. W. Jermon?

A. No, sir.

109. Q. Is there any such man that lives in Titusville, or has such a man lived there during the last five years, to your knowledge?

102 A. I could not tell you; I don't know the man.

110. Q. Do you recollect the day you made the sale of your interest in Smith's Farm to Philpot, Sherman & Co.?

A. I could not tell the day.

111. Q. Who was it deeded to or conveyed to?

A. I think it was conveyed to Mr. Picket; that is my impression of it.

Redirect:

112. Q. What did you mean in your cross-examination by your "They finally after they didn't put in this property, they used the old charter;" who did you mean by "they?"

A. I mean that they didn't put in Gruninger's, and didn't know whether I would submit or consent to have our property in, and as long as Gruninger's was not in, they used the charter—Prince & Irwin.

113. Q. State whether or not Philpot, Sherman & Co. immediately after the 6th of May, or how soon, commenced getting out the papers for incorporating the company.

A. I thought it was started immediately, at the time we were there; they employed a lawyer that day; it was not a great while before we were back in Titusville.

103 114. Q. Your property was not put in, because Gruninger's was not; do you mean to say that?

(Objected to.)

A. That is why I supposed it was not put in.

115. Q. What do you know in that regard?

A. When the last company was formed, I was not there.

116. Q. You have stated, in your cross-examination, that there was talk backwards and forwards about this old well, for which Gruninger wanted pay; do you mean to say that there was talk in your presence between Gruninger and Philpot and Sherman about that old well?

A. Yes, sir.

117. Q. State what talk there was in your presence and hearing between them about that well and the pay for it?

A. Gruninger wanted pay for an old well; Philpot, Picket, or some one, or Philpot and Sherman agreed to pay him $3,000, providing he would put his property into the company; he agreed to do so; he

104 signed the contract and they gave him a note for the amount, or a due bill.

118. Q. Do you know whether they refused to pay him for the well, unless he would go into the company?

A. I know they did; they would not settle, unless he put his property in there.

119. Q. Did you hear any remarks from either Philpot or Sherman to him at any time during their interviews there, about the character of this well, as a paying or non-paying well?

A. I heard them, both sides, say it was not paying anything; Gruninger and Sherman, & Philpot and Picket, too.

Recross:

120. Q. What did Capt. Gruninger say, if anything, about its having been of value?

A. I think he said it had been a paying well; my impression is that he told what he got out of it, but I could not say what it was.

105 121. Q. Didn't he claim at the time of the sale of the well, on the original contract, that it was a good producing well?

A. I understood him to say that it had been paying all along; whether it was at the time of the sale or not, I could not say.

122. Q. Are you acquainted with the way oil wells are managed?

A. I used to think I was.

123. Q. Supposing an oil well is owned by a number of parties, how is it managed; do they generally have a superintendent to control it?

A. Some of them do; sometimes the one that has the controlling interest attends to it.

124. Q. Ordinarily, where there is a large number of owners to a well, and no one man has the controlling interest, who manages it, or how is the property managed?

A. They generally appoint some one of the company to look after it, and attend to it; sometimes they will hire a man outside to run the institution, and steal what can.

106 125. Q. Where the well is owned by a large number of parties, do the owners, ordinarily, all the owners, take charge of the well personally.

A. O, no, sir.

J. B. BRADLEY.

The defendants then gave in evidence the letter of Lawrence Gruninger to the *the* defendants, dated May 20, 1865, having proved that it was in the handwriting of the said Gruninger, which is as follows, to wit:

Letter of Gruninger of May 20, '65.

ATTLEBORO, *May 20th*, 1865.

PHILPOT, SHERMAN & CO., *Philadelphia.*

GENTLEMEN: I am at home waiting for Prince. I am to meet him at New York, and then both of us to see you at Philadelphia. But I have not seen him yet, & you must get any document out with my name or interest mentioned in it before I see you. I have partly concluded to have nothing to do with stocking my interest.

Yours respectfully,

L. GRUNINGER.

107 The defendants then gave in evidence the depositions of George T. Barnes and Sterling Bonsal, as follows, to wit:

LAWRENCE GRUNINGER
vs.
BRIAN PHILPOT, GEORGE J. SHERMAN, AND Henry E. Picket.

The deposition of George T. Barnes and Sterling Bonsal, of the county of Philadelphia and State of Pennsylvania, witnesses of lawful age, produced, sworn, and examined on their respective corporal oaths on the first day of February, in the year of our Lord one thousand eight hundred and sixty-seven, at my office, No. 429 Chestnut street, in the city of Philadelphia, and State of Pennsylvania aforesaid, by me William V. Archer, a commissioner duly appointed by a dedimus potestatum or commission issued out of the clerk's office of the superior court of Chicago, of Cook County, in the State of Illinois, bearing teste in the name of Thomas B. Carter,
108 esq'r., clerk of the said court, with the seal of the said court affixed thereto, and to me directed as such commissioner for the examination of the said George T. Barnes and Sterling Bonsal, witnesses in a certain suit and matter in controversy now pending and undertermined in the said superior court of Chicago, wherein Lawrence Gruninger is plaintiff, and Brian Philpot, George J. Sherman, and Henry E. Picket are defendants, in behalf of the said defendants, as well upon the cross-interrogatories of the plaintiff as on the interrogatories of the defendants which were attached to or enclosed with the said commission, and upon none others. The said George T. Barnes and Sterling Bonsal, being first duly sworn by me as witnesses in the said cause, previous to the commencement of his examination, to testify the truth, as well on the part of the plaintiff as the defendant, in relation to the matters in controversy between the said plaintiff and defendants so far as he should be interrogated.

Deposition of Geo. T. Barnes.

Interrogatories propounded to the said GEORGE T. BARNES,
109 a witness produced and sworn as aforesaid on the part of the said defendants, and his answers thereto, as follows:

Interrogatory 1st. What is your name, age, occupation, and place of residence?

Answer to first interrogatory. My name is George T. Barnes; my age is thirty-one years; occupation, clerk; residence, No. 705 North Nineteenth street, in the city of Philadelphia, Penn'a.

Interrogatory 2d. Do you know the parties to this suit, or either, and which of them, and how long have you known them respectively?

Answer to second interrogatory. I know Lawrence Gruninger. I have known him nearly two years. I know Brian Philpot, George J. Sherman, and Henry Picket, the defendants. I have known each of them about two years.

Interrogatory 3rd. In what business were you employed on or about the sixth day of May, 1865, and where was such business transacted, and how long, prior to that date, had you been so employed?

110 Answer to the third interrogatory. I was clerking for Philpot, Sherman & Co. on the sixth day of May, 1865, at No. 142 South

Fourth street, in the city of Philadelphia, and had been so employed about three months prior to that time.

Interrogatory 4th. Look at a paper now shown to you, purporting to be an agreement signed Prince and Erwin, Philpot, Sherman & Company, and E. C. Bradley and Brother, dated April 21, 1865, with an agreement appendant thereto purporting to be signed L. Gruninger, and sealed, dated May 6th, 1865, and state whether you have examined the same, and annex a copy of said papers to your answers to this interrogatory, and refer to and identify the same by some mark or sign, stating what such mark or sign is, or identify such copy as attached to the deposition of some other witness.

Answer to the fourth interrogatory. (A paper purporting to be an agreement made the twenty-first day of April, 1865, between
111 Prince and Irwin, Philpot, Sherman and Company, and E. C. Bradley and Brother, all of Titusville, *Venango* County, Pennsylvania, and signed by the above parties named respectively, and witnessed by Geo. C. Duy, duly stamped with two five-cent U. S. revenue stamps. Also, an agreement appendant thereto, bearing date the sixth day of May, 1865, and signed Lawrence Gruninger, and sealed and duly stamped with one United States internal revenue five-cent stamp, was produced and shown to the witness.)

Answer to the fourth interrogatory. I have looked at the above-mentioned papers and have examined them, and now I mark the same (paper marked Exhibit "A") with my initials attached, consisting of four sheets, is a copy of the same.

Interrogatory 5. In whose handwriting are the signatures to the said two agreements respectively. State whether you know their handwriting and how you know the same. Did you see them or either of them signed by the parties; if not how and by what means, if any, are
112 you able to state whose handwriting the said signatures are respectively, and state also in whose handwriting the signing as witness to the first of said agreements is, and whether you are acquainted with his handwriting? State fully whether you know and how you know the said papers to have been executed by the parties respectively purporting to have executed the same.

Answer. I do not know the signature of Prince & Erwin. I know the signature of Philpot, Sherman & Co. I do not know the signature of E. C. Bradley & Bro. I know the signature of George C. Dewey, the subscribing witness. I know his signature is in his own handwriting. I know the papers to have been executed by the parties by their conversing in regard to the same, all the parties being present. I know they subsequently acted under this agreement. I am speaking now of this agreement dated the 21st April, 1865. I know Lawrence Gruninger's signature to the agreement of May 6, 1865. I think I saw him sign it.

Interrogatory 6. What do you know concerning the making of a note by Philpot, Sherman & Co., for three thousand dollars to Law-
113 rence Gruninger, dated May 6, 1865, payable on demand? If you know of the making of such note, state when and where the same was made, and what it was given for; what connection, if any, had the giving of said note with said agreement of May 6, 1865? state fully why and for what consideration said note was given.

Answer. I knew of such note as is enquired of in the above interrogatory. The note was made at the office of Philpot, Sherman & Co'y at about May, 6, 1865; I am not sure of the day. It was given on the supposition by Philpot, Sherman that Mr. Gruninger was to go into

the Philpot and Sherman Petroleum Co'y. They were to give this note for certain oil interests, if Mr. Gruninger should put certain oil interests into the Philpot & Sherman Petroleum Co'y, in accordance with the agreement of May 6, 1865. The formation of the company was the principal thing for which they met. In fact, as far as I know, it was the only thing. I think the giving of the note was part and par-
114 cel of the same transaction, and the formation of the company was the principal thing that Philpot, Sherman & Co'y were working for, and the acquiring of the interest from Gruninger, for which the note was given was simply an addition to the transaction. I feel sure that the whole transaction was in reference principally to the formation of the company, and it was considered important to get Mr. Gruninger and his interest into the company, as the other parties hesitated to go on without him.

Interrogatory 7. Was or was not a corporation formed and organized under and pursuant to said agreement of April 21, 1865; if yea, when and by what name and style, and has it or not continued to be and act as such body corporate?

Answer. There was a corporation organized soon after April 21, 1865, by the name and style of the Philpot & Sherman Petroleum Co'y, and it has continued and still does act as a body corporate.

Interrogatory 8. Did the said Lawrence Gruninger enter into
115 the said company, and did he or did he not contribute towards and put into the said company the property mentioned in the agreement of May 6, 1865; what did he do in respect to the same? State fully all that he did or neglected or refused or omitted to do in the premises.

Answer. He did not enter into the said company. I know this on being connected with company. I kept the minutes of the formation of the company. So far as I know, he declined to go into the company, and has not had nor has now any connection with it. This declination was after he had received the said note.

Interrogatory 9. Where did the said Lawrence Gruninger go, if anywhere, after the making of said agreement? Did he or not send any dispatch by telegraph to any person; if yea, to whom was the same sent, and what were the contents of said dispatch? If such was sent or received, was it sent to the care of any person; and if so, who was that person, and did he receive the same? Is such dispatch in your
116 possession or under your control? If yea, annex the same to your deposition and refer to and identify the same.

Answer. I know Lawrence Gruninger went to Attleboro, Mass. He did send a dispatch by telegraph; I saw it. It was sent to D. W. Prince. This dispatch advised him not to go into the company. It was sent to the care of Bonsal Bro's, and they received it. The dispatch is not in my possession, or under my control. (Dispatch produced by Mr. Bonsal, and marked "Exhibit B," initials of Mr. Barnes. Dispatch being shown witness, he says: This is the dispatch—I have marked it "Exhibit B," my initials, G. T. B.)

Interrogatory 10. To what company did said dispatch refer, and what do you understand the words in said dispatch "Do not take the company; you know my reasons," mean?

Answer. The company referred to was the Philpot and Sherman company. I understand the words referred to, to mean that he advised him not to go into the company.

117 Interrogatory 11. When did you first know of the intention of

the said Lawrence Gruninger, (if you ever knew thereof,) not to go into said company, or put in his property. How did you first, if ever, learn thereof? State fully.

Answer. I first knew of it the day of the receipt of the dispatch. I think I was going to Bonsal Bro's office, and there I saw the dispatch, and from it I presumed he intended not to go in.

Interrogatory 12. State what, if anything, the said Philpot, Sherman & Co. have done or been doing toward the furtherance of the said projected enterprise, up to the time the said Lawrence Gruninger failed, omitted, neglected, or refused to coöperate therein, if he ever did so fail, omit, neglect, or refuse.

Answer. They did all they could do towards organizing the company.

Interrogatory 13. If, in answer to the 6th interrogatory, you state that the consideration of said note was, "That the said Lawrence
118 Gruninger should and would go into said projected company, and put in his property as set forth in the agreement of May 6, 1865, and also, that he should or would sell the said Philpot, Sherman & Co. a certain interest he had or claimed to have in a certain oil well," state what oil well it was, how it was called, where was it situated, what was the nature, share, or extent of the interest in the same which the said Lawrence Gruninger was so to sell to said Philpot, Sherman & Co.?

Answer. I don't know the particular well; I know that it was not the same as was to be put into the company.

Interrogatory 14. What do you know, if anything, of the share or interest of the said Lawrence Gruninger in the said oil well, which he so proposed to sell to Philpot, Sherman & Co.? What was said share or interest worth on the 6th day of May, 1865, or at any time since?

Answer. I do not know anything of the value of the share or interest at that time, or at any time since.

119 Interrogatory 15. State any other fact you may know tending to show that the plaintiff in this action is not justly entitled to recover for the amonnt of the said promissory note, or any part thereof.

Answer. I know that Philpot, Sherman & Co. refused to pay the note, and always claimed that the consideration for which it was given had failed—that Mr. Gruninger had not fulfilled his part of the obligation.

GEO. T. BARNES.

Sworn & subscribed before me this 1st day of February, A. D. 1867.

W. V. ARCHER,
Commissioner of Illinois, Philadelphia, Pa.

STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

I, William V. Archer, an Illinois commissioner, in and for the said county and State, do hereby certify that the said wit[illegible], George T. Barnes, prior to the taking of the foregoing deposition, and on the said first day of February, A. D. 1867, was by me duly sworn to testify the truth in relation to the matter in controversy in the suit mentioned
120 in the caption to these depositions, and in the enclosed commission, so far as he might be interrogated in relation thereto, and the said deposition was, on the first day of February, A. D. 1867, at Philadelphia, in said county and State, taken and reduced to writing, and signed and sworn to by said witness in my presence.

Deposition of Sterling Bonsal, esq.

The said STERLING BONSAL, being first duly affirmed, doth depose and say, in answer to the several interrogatories, as follows, to wit:

Interrogatory 1. What is your name, age, occupation, and place of residence?

Answer. My name is Sterling Bonsal; age, 32; occupation, conveyancer; residence, No. 176 North 9th street, in the city of Philadelphia, Penn'a.

Interrogatory 2. Do you know the parties to this suit, or either, and which of them, and how long have you known them respectively?

Answer. I know Lawrence Gruninger. I have seen him but a
121 few times, however. I know Brian Philpot, George J. Sherman, and Henry E. Picket. I have known them about 3 years.

Interrogatory 3. In what business were you employed on and about the sixth day of May, 1865, and where was such business transacted, and how long prior to that date had you been so employed?

Answer. I was a conveyancer, at No. 116 North 9th street, in the city of Philadelphia, on the 6th of May, 1865, and had been so employed about eight years prior to that date.

Interrogatory 4. Look at the paper now shown to you, purporting to be an agreement, signed Prince & Erwin, Philpot, Sherman & Co., and E. C. Bradley & Brother, dated April 21, 1865, with an agreement appendant thereto, purporting to be signed L. Gruninger, and sealed, dated May 6th, 1865, and state whether you have examined the same, and annex a copy of said papers to your answer to this interrogatory, and refer to and identify the same by some mark or sign, stating what
122 such sign or mark is, or identify such copy as attached to the deposition of some other witness.

Answer. (Paper produced and shown to witness.) I have examined this paper, and I identify the copy attached to the depositions of George T. Barnes, marked "Exhibit A, G. T. B."

Interrogatory 5. In whose handwriting are the signatures to the said two agreements respectively? State whether you know their handwriting, and how you know the same. Did you see them, or either of them, signed by the parties; if not, how and by what means, if any, are you able to state whose handwriting the said signatures are respectively? And state, also, in whose handwriting the signing as witness to the first of said agreements is, and whether you are acquainted with his handwriting. State fully whether you know, and how you know, the said papers to have been executed by the parties respectively purporting to have executed the same.

Answer. I do not know from general knowledge the signatures of Prince & Erwin, E. C. Bradley & Brother, and Lawrence Gru-
123 ninger. I do know the signature of Philpot, Sherman & Co. I believe that the signature of George A. Dewey is in his own handwriting. I have seen him sign as witness to other papers. I did not see either of the signatures to the agreement signed, but I believe them to have been executed, as I was called upon by them to draw papers relative to the formation of the company, and for that purpose went to the office of Philpot, Sherman & Co., where I met Mess. Prince & Erwin, E. C. Bradley, Lawrence Gruninger, Brian Philpot, and George J. Sherman. The agreement was produced, read over by me, and was not denied or objected to by any of the parties, and I was directed to prepare

the said Lawrence Gruninger, (if you ever knew thereof,) not to go into said company, or put in his property. How did you first, if ever, learn thereof? State fully.

Answer. I first knew of it the day of the receipt of the dispatch. I think I was going to Bonsal Bro's office, and there I saw the dispatch, and from it I presumed he intended not to go in.

Interrogatory 12. State what, if anything, the said Philpot, Sherman & Co. have done or been doing toward the furtherance of the said projected enterprise, up to the time the said Lawrence Gruninger failed, omitted, neglected, or refused to coöperate therein, if he ever did so fail, omit, neglect, or refuse.

Answer. They did all they could do towards organizing the company.

Interrogatory 13. If, in answer to the 6th interrogatory, you state that the consideration of said note was, "That the said Lawrence
118 Gruninger should and would go into said projected company, and put in his property as set forth in the agreement of May 6, 1865, and also, that he should or would sell the said Philpot, Sherman & Co. a certain interest he had or claimed to have in a certain oil well," state what oil well it was, how it was called, where was it situated, what was the nature, share, or extent of the interest in the same which the said Lawrence Gruninger was so to sell to said Philpot, Sherman & Co.?

Answer. I don't know the particular well; I know that it was not the same as was to be put into the company.

Interrogatory 14. What do you know, if anything, of the share or interest of the said Lawrence Gruninger in the said oil well, which he so proposed to sell to Philpot, Sherman & Co.? What was said share or interest worth on the 6th day of May, 1865, or at any time since?

Answer. I do not know anything of the value of the share or interest at that time, or at any time since.

119 Interrogatory 15. State any other fact you may know tending to show that the plaintiff in this action is not justly entitled to recover for the amonnt of the said promissory note, or any part thereof.

Answer. I know that Philpot, Sherman & Co. refused to pay the note, and always claimed that the consideration for which it was given had failed—that Mr. Gruninger had not fulfilled his part of the obligation.

GEO. T. BARNES.

Sworn & subscribed before me this 1st day of February, A. D. 1867.

W. V. ARCHER,
Commissioner of Illinois, Philadelphia, Pa.

STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

I, William V. Archer, an Illinois commissioner, in and for the said county and State, do hereby certify that the said witness, George T. Barnes, prior to the taking of the foregoing deposition, and on the said first day of February, A. D. 1867, was by me duly sworn to testify the truth in relation to the matter in controversy in the suit mentioned
120 in the caption to these depositions, and in the enclosed commission, so far as he might be interrogated in relation thereto, and the said deposition was, on the first day of February, A. D. 1867, at Philadelphia, in said county and State, taken and reduced to writing, and signed and sworn to by said witness in my presence.

Deposition of Sterling Bonsal, esq.

The said STERLING BONSAL, being first duly affirmed, doth depose and say, in answer to the several interrogatories, as follows, to wit:

Interrogatory 1. What is your name, age, occupation, and place of residence?

Answer. My name is Sterling Bonsal; age, 32; occupation, conveyancer; residence, No. 176 North 9th street, in the city of Philadelphia, Penn'a.

Interrogatory 2. Do you know the parties to this suit, or either, and which of them, and how long have you known them respectively?

Answer. I know Lawrence Gruninger. I have seen him but a
121 few times, however. I know Brian Philpot, George J. Sherman, and Henry E. Picket. I have known them about 3 years.

Interrogatory 3. In what business were you employed on and about the sixth day of May, 1865, and where was such business transacted, and how long prior to that date had you been so employed?

Answer. I was a conveyancer, at No. 116 North 9th street, in the city of Philadelphia, on the 6th of May, 1865, and had been so employed about eight years prior to that date.

Interrogatory 4. Look at the paper now shown to you, purporting to be an agreement, signed Prince & Erwin, Philpot, Sherman & Co., and E. C. Bradley & Brother, dated April 21, 1865, with an agreement appendant thereto, purporting to be signed L. Gruninger, and sealed, dated May 6th, 1865, and state whether you have examined the same, and annex a copy of said papers to your answer to this interrogatory, and refer to and identify the same by some mark or sign, stating what
122 such sign or mark is, or identify such copy as attached to the deposition of some other witness.

Answer. (Paper produced and shown to witness.) I have examined this paper, and I identify the copy attached to the depositions of George T. Barnes, marked "Exhibit A, G. T. B."

Interrogatory 5. In whose handwriting are the signatures to the said two agreements respectively? State whether you know their handwriting, and how you know the same. Did you see them, or either of them, signed by the parties; if not, how and by what means, if any, are you able to state whose handwriting the said signatures are respectively? And state, also, in whose handwriting the signing as witness to the first of said agreements is, and whether you are acquainted with his handwriting. State fully whether you know, and how you know, the said papers to have been executed by the parties respectively purporting to have executed the same.

Answer. I do not know from general knowledge the signatures of Prince & Erwin, E. C. Bradley & Brother, and Lawrence Gru-
123 ninger. I do know the signature of Philpot, Sherman & Co. I believe that the signature of George A. Dewey is in his own handwriting. I have seen him sign as witness to other papers. I did not see either of the signatures to the agreement signed, but I believe them to have been executed, as I was called upon by them to draw papers relative to the formation of the company, and for that purpose went to the office of Philpot, Sherman & Co., where I met Mess. Prince & Erwin, E. C. Bradley, Lawrence Gruninger, Brian Philpot, and George J. Sherman. The agreement was produced, read over by me, and was not denied or objected to by any of the parties, and I was directed to prepare

the necessary certificates for the formation of the company, & the parties were to place in my hands the evidences of their ownership of the interests to be contributed by them towards the company. It is on these facts that I base my declaration. Lawrence Gruninger took my name, and the address of our firm, for the purpose of communicating with me.

124 Interrogatory 6th. What do you know concerning the making of a note by Philpot, Sherman & Co., for three thousand dollars to Lawrence Gruninger, dated May 6, 1865, payable on demand? If you know of the making of such note, state when and where the same was made, and what it was given for. What connection, if any, had the giving of the said note with the agreement of May 6th, 1865? State fully why, and for what consideration, the said note was given.

Answer. I did not know of such a note, or the consideration thereof, until after the said Lawrence Gruninger had declined to join the company, and then only from statements of Philpot & Sherman.

Interrogatory 7. Was or was not a corporation formed and organized under and pursuant to said agreement of April 21, 1865; if yea, when, and by what name and style, and has it or not continued to be and act as such body corporate?

125 Answer. There was a corporation formed called the Philpot and Sherman Petroleum Company, which still continues, as I believe, to be and act as a corporation. I prepared the certificates and procured their charter.

Interrogatory 8. Did the said Lawrence Gruninger enter into the said company and did he or did he not contribute towards and put into the said company the property mentioned in the agreement of May 6, 1865? What did he do in respect to the same? State fully all that he did, or neglected, refused or omitted to do in the premises.

Answer. He did not to my knowledge enter into the said company or put in the said property. As I prepared the papers and he failed to come forward with his proportion, the company was formed without him, and I do not know of his subsequently entered.

Interrogatory 9. Where did the said Lawrence Gruninger go, if any where, after the making of said agreement? Did he or not send any dispatch by telegraph to any person? If yea, to whom was the

126 same sent, and what was the contents of said dispatch? If such was sent or received, was it sent to the care of any person, and if so, who was that person, and did he receive the same? Is such dispatch in your possession or under your control? If yea, annex the same to your deposition and refer to and identify the same.

Answer. He left the city. I don't know where he went. He sent a telegraphic dispatch to Prince and Erwin, either to my care or the care of Bonsal Brothers, I do not remember which. I received it, and took it to the Continental Hotel, where Prince and Erwin were stopping. They read it and handed it to me. The contents were as follows: "Attleboro, May 29. Prince & Irwin, Hund. sixteen N. Ninth, Ph'a. Do not take the company. You know my reason. Shall keep my interest. Have spoke to a N. Y. company. They want to buy mine and yours. Will let you know as soon as they make an offer. L. Gruninger." The dispatch is now in my possession. Produced and attached to the

127 deposition of George T. Barnes, marked "Exhibit B, G. T. B."

Interrogatory 10. To what company did said dispatch refer and what do you understand the words in said dispatch "Do not take the company; you know my reason," mean.

Answer. I think he referred to the company the agreement was about.

Prince and Erwin, upon receiving the dispatch so expressed themselves when they asked me to read the dispatch. I do no not know what reasons he refers to.

Interrogatory 11. When did you first know of the intention of the said Lawrence Gruninger (if you ever knew thereof) not to go into said company or put in his property. How did you first, if ever, learn thereof? State fully.

Answer. I do not know other than as above stated.

Interrogatory 12. State what, if anything, the said Philpot, Sherman & Co. had done or been doing towards the furtherance of the said projected enterprise up to the time the said Lawrence Gruninger
128 failed, omitted, neglected, or refused to coöperate therein, if he ever did so fail, neglect, or refuse?

Answer. They seemed to use every means in their power to carry through the said company.

Interrogatory 13. If, in answer to the 6th interrogatory, you state that the consideration of said note was that the said Lawrence Gruninger should and would go into said projected company, and put in his property, as set forth in the agreement of May 6, 1865; and also, that he should or would sell to the said Philpot, Sherman & Co. a certain interest he had, or claimed to have, in a certain oil well, state what oil well it was, how it was called, where was it situated, what was the nature, share, or extent of the interest in the same, which the said Lawrence Gruninger was so to sell to the said Philpot, Sherman & Co.

Answer. I do not know anything of the matters inquired of in this interrogatory.

Interrogatory 14. What do you know, if anything, of the value
129 of this share or interest of the said Lawrence Gruninger in the said oil well which he so proposed to sell to said Philpot, Sherman & Co? What was said share or interest worth on the 6th day of May, 1865, or at any time since?

Answer. I do not know anything of the matters inquired of in this interrogatory.

Interrogatory 15. State any other facts you may know, tending to show that the plaintiff in this action is not justly entitled to recover for the amount of the said promissory note, or any part thereof.

Answer. The refusal of said Lawrence Gruninger to join in said company much embarrassed and delayed the formation of said company.

STERLING BONSAL.

Sworn & subscribed before me this first day of February, A. D. 1867.

W. V. ARCHER,
Commissioner of Illinois, Philadelphia, Pa.

130 STATE OF PENNSYLVANIA,
City & County of Philadelphia, ss :

I, William V. Archer, of the county of Philadelphia, and State of Pennsylvania, a commissioner duly appointed to take the depositions of the said George T. Barnes and Sterling Bonsal, witnesses, whose names are subscribed to the foregoing depositions, do hereby certify that, previous to the commencement of the examination of the said George T. Barnes and Sterling Bonsal as witnesses in the suit between the said Lawrence Gruninger, plaintiff, and the said Brian Philpot, George J. Sherman, and Henry E. Picket, defendants, they were duly sworn or

affirmed by me as such commissioner to testify the truth in relation to the matters in controversy between the said Lawrence Gruninger, plaintiff, and the said Brian Philpot, George J. Sherman, and Henry E. Picket, defendants, so far as they should be interrogated concerning the same; that the said depositions were taken at my office, No. 429 Chestnut street, in the city of Philadelphia, in the county of
131 Philadelphia, and State of Pennsylvania, on the first day of February, A. D. 1867; and that, after said depositions were taken by me as aforesaid, the interrogatories and answers thereto as written down were read over to the said witnesses, and that, thereupon, the same was signed and sworn to by the said deponents, George T. Barnes and Sterling Bonsal, before me, the oath being administered by me, William V. Archer, as such commissioner, at the place and on the day and year last aforesaid.

[SEAL.]

W. V. ARCHER,
Commissioner of Illinois, Philadelphia, Pa.

[5-cent rev. stamp, cancelled.]

132 EXHIBIT B, G. T. B.

370.] ATTLEBORO, MAY XXIXTH.

PRINCE AND IRWIN,
Hund. sixteen N. Ninth, Ph'a.

Do not take the company. You know my reason. Shall keep my interest. Have spoke to a N. Y. company. They want to buy mine and yours. Will let you know as soon as they make an offer.

L. GRUNINGER.

133 EXHIBIT "A," G. T. B.

[5-cent U. S. int. rev. stamp.] [5-cent U. S. int. rev. stamp.]

This agreement, made this 21st day of April, 1865, between Prince & Irwin, Philpot, Sherman & Co., and E. C. Bradley & Bro., all of Titusville, *Venango* County, Pennsylvania, witnesseth:

That the said parties covenant and agree with each other to furnish the hereinafter-mentioned properties at the prices thereto attached, for the purpose of forming a stock company, the name and style of which shall be hereafter determined on.

Prince & Irwin agree, for their part, to furnish and put into said company the following interests, to wit:

$\frac{1}{24}$ working interest—$\frac{1}{48}$ of the oil in the Lady Washington Well and lease on the Blood Farm, producing about 65 barrels.

$\frac{1}{16}$ working interest—$\frac{1}{32}$ of the oil in the Demming Well and lease on the John McClintock Farm, producing 25 barrels.

$\frac{1}{16}$ working interest—$\frac{1}{32}$ of the oil in Follett Well and lease on the McClintock Reserve; said well drilled and ready for testing.

$\frac{1}{8}$ working interest—$\frac{1}{8}$ of the oil in the Erwin Well & lease on the McClintock Reserve, producing 30 barrels.

134 $\frac{1}{32}$ working interest—$\frac{1}{64}$ of the oil in the Amazon Well and lease on the Smith Farm, producing 40 barrels, with one other well going down.

$\frac{1}{2}$ working interest—$\frac{1}{4}$ of the oil in well and lease No. 11, Smith Farm, producing 50 barrels.

The price at which the above interests are to be put into the joint property of the company is to be $52,000.

Philpot, Sherman & Co. agree, for their part, to furnish and put into said company the following properties, to wit:

⅛ land interest in the James A. Stevenson Farm; one well going down; 98 acres.

¼ land interest in 5 acres of the Pit Hole Farm, known as the Reynolds Farm, being some five acres sold by them to Andrews & Byers, upon which two wells are to be put down at once.

10 acres in fee, part of said Reynolds Farm; 4¼ acres in fee, part of the farm known as the Ackerman Farm, on Cherry Run, subject to a reservation of $\frac{1}{20}$ of the oil to the original proprietors.

135 The price at which the above interests are to be put into the joint property of the company is to be $50,000.

E. C. Bradley & Bro. agree, for their part, to furnish and put into said company the following properties, to wit:

$\frac{1}{16}$ working interest—$\frac{1}{32}$ of the oil in the Fee Well and lease No. 9, on the Smith Farm, now producing about 20 barrels per day, and one other well going down, to be completed free of expense to the company.

¼ working interest—⅛ of the oil in three wells and leases, Nos. 9, 16, & 21, on the Jno. McClintock Farm; said wells now going down, and to be completed and tested free of charge to the company.

¼ of the oil-land interest in two half-acre leases on McClure Farm, Nos. 7 & 8, on Cherry Run; two wells going down.

$\frac{1}{16}$ free interest—$\frac{1}{32}$ of the oil in lot No. 18, McFate Farm, 60 rods above Smith Farm, on Cherry Run; well down 600 feet.

135½ The price at which the above interests are to be put into the joint property of the company is to be $32,000, making in all, as the cost price of property to be put in, $134,000. Each party is to furnish necessary plans, surveys, briefs of title, and conveyances, at their own proper costs and charges.

It is agreed that Philpot, Sherman & Co. are to take charge of the property, and to get a charter, and take all proper and necessary steps for the formation of the company, and procuring subscriptions to the stock of the same in which the other parties are to assist so far as they may be able. The parties putting in producing interests are to retain the production until the sum of worth of the stock shall be sold and the proceeds divided as hereafter mentioned, and then the production is to be turned over to the company.

The par value of the shares of stock and the subscription price for the same shall be $5, and the capital stock shall be 60,000 shares of which 5,000 shares shall be reserved for a working capital. As

136 fast as the stock shall be sold and the money realized the same shall be divided pro rato among the parties hereto; and after all expenses of procuring the charter and other necessary expenses & commissions shall have been paid the entire profits are to be divided among the several parties hereto pro rata, according to the several amounts put in by each, whether the said profits shall be in cash or in stock of the company.

The election of directors and officers of the company and the full organization of the same is postponed for further consideration and agreement; and it is understood that if there should be a failure to make sale of sufficient stock to justify the organization of the company then the interests and properties are to revert to their respective owners, and each party is to pay them pro rata share of the expenses incurred.

In witness whereof the said parties have hereto set their hands and seals the day and date first above written.

PRINCE & ERWIN.
(Signed) PHILPOT, SHERMAN & CO.
E. C. BRADLEY & BROTHERS.

Witness: GEO. C. DUY.

137 [U. S. int. rev. stamp, 5 cts.]

PHILAD'A, *May 6th*, 1865.

It is agreed this day that Lawrence Gruninger is to put into this company one-half the working interest, it being one-fourth of all the oil in or to be produced from the lease and lot No. 11, on the Smith Farm, Cherry Run, on the same terms and conditions that the balance of the parties furnish their several properties, and also to take the same portion and pro rata of profits in the said company at and for the sum of thirty thousand dollars.

(Signed) LAWRENCE GRUNINGER. [L. S.]

The defendants then gave in evidence the deposition of Nelson Coombs as follows, to wit:

Deposition of Nelson Coombs.

Deposition of NELSON COOMBS, taken October 18th, 1869, at Titusville, Pa., before F. L. Seely, U. S. commissioner, on behalf of said defendants.

Interrogatory first. What is your name, age, occupation, and place of residence?

First. To the first interrogatory he saith that his name is Nelson Coombs, aged fifty-four years; his place of residence is the city of Titusville, county of Crawford, and State of Penn'a, and at present engaged in producing oil.

138 Interrogatory second. Do you know the parties to this suit, or either, and which of them; and how long have you known them respectively?

Second. To the second interrogatory he saith: I am personally acquainted with all the parties to this suit; I have known the pl'ff, as the wife of Captain Gruninger (so called here) for about five years last past, and the def'ts and each of them for some time longer?

3. In what business were you employed on and about the sixth day of May, 1865, and before and after that time? Had you anything to do with a certain oil well known and described as well number two, on lot number seven, east of Oil Creek, on the Blood Farm, in Venango County, Pennsylvania? If yea, what had you to do with said well; and for how long a time before and after the 6th day of May, 1865?

Third. To the third interrogatory he saith he was engaged and employed in and about the sixth day of May, 1865, and before and after that time on lease number seven, on the Blood Farm, in the county

139 of Venango, and State of Penn'a; I had something to do with a certain oil well known and described as well number two, on lot number seven, on the Blood Farm before mentioned; I was owner at the time of one-fourth of the working interest in said well; I was engaged in running and pumping the well, and trying to make it produce; I was thus engaged in said well after it was put down for several

months, and until fall, as near as I can remember, and for several months before and at the time it was being put down; the well was put down or finished in or about the month of May, 1864, as near as I can recollect.

4. Did you ever know the said well, and for how long a time before and after the 6th day of May, 1865?

Fourth. To the fourth interrogatory he saith: I did know the said well for a year at least before the 6th day of May, 1865, and for two years and more thereafter.

140 5. Did the plaintiff's testator, Lawrence Gruninger, own or claim any interest in said well previous to May 6th, 1865; and if yea, what share or interest did he have or claim to have in said well. If you used any special or technical terms, employed in the oil regions, to describe such interest, explain the same and tell what the words mean and show the extent or share of said Gruninger, if any, in said well.

Fifth. To the fifth interrogatory he saith: The pl'ff's testator, Lawrence Gruninger, did own or claim an interest in said well previous to May 6th, 1865. He claimed to have one-eighth working interest in said well, that is, one sixteenth interest in all the well produced, after deducting the current expenses of the well.

6. Did said Gruninger make any disposition of his interest in said well, or of any supposed interest therein; if yea, when and to whom?

Sixth. To the sixth interrogatory he saith: Gruninger told me
141 that he had disposed of his whole interest in said well. He, Gruninger, said that he had sold said interest to Philpot, Sherman & Picket, the defendants in this suit, *meaning*.

7. What was the said interest of the said Lawrence Gruninger, if any he had, worth on the 6th day of May, 1865, and what has it been worth at any time since? State in this connection what quantity, if any, of oil said well was producing per day at that time, or at any time since, and what it was worth and any and all other facts showing the value then, or since, of said Gruninger's interest, if any, in said well.

Seventh. To the seventh interrogatory he saith: The interest of said Lawrence Gruninger in said well on the 6th day of May, 1865, was worth but very little if anything. It never was a paying well, and to defendant's knowledge and belief, never has been worth anything since.

I don't think this well produced any oil in May, 1865; since that
142 time it has produced a very little oil, but never enough to pay expenses. That said well was worked until it was now in debt, and everything pertaining to the same was sold on execution, consequently I don't think Gruninger's interest, if any, at that time or since, worth anything.

8. Was there on the 6th day of May, 1865, any incumbrance, assessment upon, or claim against, the share or interest of the said Lawrence Gruninger in said well; if yea, what was such assessment, claim, or incumbrance. State the amount, extent, and nature thereof.

Eighth. To the eighth interrogatory he saith: That, on the sixth day of May, 1865, or at the time when Gruninger told me he had sold his interest as before stated, there was an incumbrance, or assessment upon, or claim against, said Gruninger interest in said well. The amount against Gruninger's interest at the time was about $200, over one-half of which amount was for oil taken away by him, and the balance was for unpaid expenses in operating the well.

143 9. State whether or not well number two, lot number seven, east side of Oil Creek, Blood Farm, Venango County, Pennsyl-

vania, is the same well or a different one from that otherwise described as on the Coombs Lease, on the Blood Farm, situated in Venango County, Pennsylvania, in which said Gruninger had one-eighth of the working interest.

Ninth. To the ninth interrogatory he saith: That well, number two, lot number seven, east side of Oil Creek, Blood Farm, Venango County, Penn'a, is the same well described in the Coombs Lease on the Blood Farm, situated in Venango County, Penn'a, in which said Gruninger had an eighth working interest and that since Gruninger had no other interest in any oil-well on the Blood Farm, known as the Coombs Well.

10. Did or not said Gruninger have any interest in any more than one well on the Blood Farm; was there or not more than one Coombs Lease on the Blood Farm?

Tenth. To the tenth interrogatory he saith: That said Gruninger had an interest in only one well on the Blood Farm. There was but one Coombs Lease on the Blood Farm, and but one well on this lease in which Gruninger had an interest, so far as deponent has any knowledge.

144

11. Did or not the defendants Philpot, Sherman & Co., ever take possession of the the said well, number two, hereinbefore referred to.

Eleventh. To the eleventh interrogatory he saith: That the defendants Philpot, Sherman & Co., never took possession of well number two hereinbefore mentioned, so far as deponent has any knowledge.

12. State any other fact or facts known to you tending to show that the plaintiff is not justly entitled to recover in this suit.

Twelfth. To the twelfth interrogatory he saith: That he has no further knowledge in relation to the matter that he can think of at present.

NELSON COOMBS.

Sworn and subscribed before me this 18th day of October, 1869.
[SEAL.] F. L. SEELY,
U. S. Commissioner.

145 Cross-interrogatories to Nelson Coombs:

1. Have you conversed with any one in reference to what you should testify in this case since the 25th day of September, 1869? Have you seen either of said defendants since said time, and if so, was anything said to you about what you were to swear to in this case? Did you see the foregoing interrogatories or a copy of them, or any or either of them before you gave your answers thereto before the commissioner? Did any one, before you gave your testimony, make any suggestions to you, either verbally or in writing, as to what answer you should or could make to the foregoing interrogatories, or to either or any of them?

First. To the first cross-interrogatory he saith: I have not conversed with any one in reference to what I should testify in this case since the 25th day of September, 1869. I have seen one of said defendants since said 25th day of Sept., 1869, and but one of them. Nothing was said to me by either of said defendants since said time before-

146 mentioned about what I was to swear to in this case. I did not see the foregoing interrogatories, nor a copy of them, or any or either of them before I gave my answers thereto before the commissioner. No one at any time before I gave my testimony made any suggestions to me either verbally or in writing, as to what answer I should give or could make to the foregoing interrogatories or to either or any of them.

2. Is not the product of oil wells very uncertain, and does not their

value depend almost entirely upon the quantity they produce, and does not their value fluctuate very rapidily at times.

Second. To the second cross-interrogatory he saith: The product of oil wells is very uncertain, and their value does depend almost entirely upon the quantity they produce, and their value fluctuates very rapidly at times.

NELSON COOMBS.

147 Sworn and subscribed before me this 18th day of October, 1869.
[SEAL.] F. L. SEELY,
U. S. Com'r.

The defendants then gave in evidence to the jury the charter of the Philpot and Sherman Petroleum Company, of May 25, 1865, as follows:

PENNSYLVANIA, *ss:*

A. G. CURTIN.

{SEAL OF THE STATE OF PENNSYLVANIA.} In the name & by the authority of the Commonwealth of Pennsylvania, Andrew G. Curtin, governor of the said Commonwealth, to all to whom these presents shall come, sends greeting:

Whereas, in and by an act of the general assembly of the Com-
148 monwealth of Pennsylvania, entitled "An act to authorize the governor to issue letters-patent in certain cases," approved the seventh day of May, anno Domini one thousand eight hundred and fifty-five, the governor of this Commonwealth is authorized and required to issue letters patent to all companies formed under the provisions of an act entitled "An act to enable joint tenants, tenants in common, and adjoining owners of mineral lands in this Commonwealth to manage and develop the same," approved the twenty-first day of April, anno Domini, one thousand eight hundred and fifty-four.

And whereas, the stipulations, conditions, and things directed to be performed in the said recited act of the general assembly, and the several supplements thereto have been fully complied with by the "Philpot and Sherman Petroleum Company" formed under the provisions of said recited act and supplements. The chief operations of said company are to be carried on in the county of Venango, State of Pennsylvania.

149 Now know ye that, in pursuance of the power and authority to me given by law, I, Andrew G. Curtin, governor of the said Commonwealth, do, by these presents which I have caused to be made patent and sealed with the great seal of the State, create and erect the subscribers to the stock of the said company, for the number of shares by them subscribed, to wit:

Brian Philpot, Philadelphia, Pennsylvania, twenty thousand shares.

George J. Sherman, Philadelphia, Pennsylvania, nineteen thousand shares.

Henry E. Picket, Titusville, Pennsylvania, nineteen thousand shares.

Charles A. Day, Philadelphia, Pennsylvania, one thousand shares, and

George T. Barnes, Philadelphia, Pennsylvania, one thousand shares.

Amounting in the whole to sixty thousand shares.

And also those who may thereafter become subscribers or hold-
150 ers of the stock of the said company into one body politic and corporate in deed and in law, by the name, style, and title of the "Philpot and Sherman Petroleum Company."

And by the said name the said subscribers shall have perpetual succession, and all the privileges and franchises incident to a corporation.

And the said subscribers, and those who shall afterwards subscribe to the stock of the said company, their successors and assigns, are generally to be invested with all the rights, powers, and privileges, with full force and effect, and be subject to all the duties, requisitions, and restrictions, specified and enjoined in and by the said acts of the general assembly, and all other laws of this Commonwealth.

Given under my hand and the great seal of the State, at Harrisburg, this twenty-fifth day of May, in the year of our Lord one thousand eight hundred and sixty-five, and of the Commonwealth the eighty-ninth.

By the governor:

ELI SLIFER,
Secretary of the Commonwealth.

151 The defendants then gave in evidence to the jury the deed of Lawrence Gruninger to the defendants, dated May 6, 1865, with acknowledgment as follows:

Deed from Gruninger.

For and in consideration of the sum three thousand dollars, to me in hand paid, the receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter mentioned, I have and do for myself, my heirs, and assigns, hereby sell, release, transfer, set over and convey unto Philpot, Sherman and Co. one ($\frac{1}{8}$) eighth of the working interest, being one ($\frac{1}{16}$) sixteenth of all the oil produced from well No. (2) two, lot No. (7) seven, east side of Oil Creek, Blood Farm, Venango Co., State of Penn'a; the said interest, at all times, to be subject to one ($\frac{1}{8}$) eighth of the working expenses of said well, and in all respects to be subject to the original lease from James A. McCray to F. E. Morse.

In witness whereof I have hereto set my hand and seal this sixth day of May, A. D. one thousand eight hundred and sixty-five.

L. GRUNINGER. [SEAL.]

In presence of—
D. WAITE PRINCE.
EDMOND WILCOX.

[U. S. int. rev. stamp, $3 00, cancelled.]

152 STATE OF PENNSYLVANIA,
City of Philadelphia, ss:

Be it known that, on this twenty-sixth day of May, A. D. 1865, before me, Edmond Wilcox, notary public for the Commonwealth of Pennsylvania, by lawful authority, duly commissioned and sworn, residing in said city, personally appeared Lawrence Gruninger and acknowledged the foregoing & within instrument of writing as and for his act & deed.

In testimony whereof I have hereunto set my hand & affixed my notarial seal the day and year above written.

[NOTARIAL SEAL.] EDMOND WILCOX,
Notary Public.

153 The defendants then gave in evidence the agreement between Lawrence Gruninger and the defendants, Philpot & Picket, dated October 19, 1864. This is the agreement for the sale of well No. 2,

Coombs Lease, Blood Farm, for $3,500, which was produced by the plaintiff. Pursuant to notice from the defendants, on producing this agreement the plaintiff's counsel stated that the plaintiff claimed nothing under said agreement, and offered to cancel it. The agreement is as follows, to wit:

Agreement of Oct. 19, '64.—Blood Farm.

Article of agreement made and concluded this 19th day of Oct., A. D. 1864, between Lawrence Gruninger, of Venango Co., Penn., of the first part, and B. Philpot & Henry E. Picket, of the second part, witnesseth: That, for and in consideration of one dollar in hand paid, the receipt whereof is hereby acknowledged, hath bargained, & sold to the parties of the second part his interest in the well on the Coombs Lease, on the Blood Farm, said interest being one-eight' of the working interest
154 of one sixteenth of all the oil from said well; the parties of the second part agree to pay, within thirty days from this date, the sum of thirty-five hundred dollars.

In witness whereof we have hereunto set our hands and seals the day and date above written.

L. GRUNINGER. [SEAL.]
B. PHILPOT. [SEAL.]
H. E. PICKET. [SEAL.]

Witness:
J. W. JERMON.
[5-c't int. rev. stamp cancelled]

The defendants then produced, and offered to give in evidence to the jury, the articles of partnership between the defendants, but the defendants did not propose to offer any other evidence of the fact than the articles of copartnership, and proved the signatures thereto to be the handwriting of the said defendants, respectively, but offered no other evidence tending to show the fact sought to be established. To the introduction of which, in evidence, the plaintiff objects, on the ground that they were incompetent; whereupon the defendants stated that the object for which they were offered was to show that the partnership
155 of the defendants did not commence, and was not in existence, when the agreement of October 19th, 1864, were made. And the court sustained said objection, and refused to permit the same to be used in evidence; to which opinion of the court, in refusing to permit said articles to be read in evidence, the defendants, at the time thereof, excepted; which articles are as follows, to wit:

Articles of copartnership.

This agreement, made and entered into this eighth day of November, A. D. one thousand eight hundred and sixty-four, by and between Brian Philpot, of the city of Philadelphia, and State of Penn'a, and Geo. J. Sherman and Henry E. Picket, of the borough of Titusville, County of Crawford, and State of Penn'a, witnesseth: That the parties to this agreement are to jointly conduct the business of the office heretofore opened in Titusville, by Philpot & Sherman, called Real Estate and Oil Territory Agency, for the purchase and sale of real estate, oil leases, and
156 other property, and each of the parties are to furnish for the joint

use of the concern an equal amount of money, and to equally divide all commissions, profits, and gains that may arise or accrue from said partnership; and it is agreed and understood that the name and style of said firm shall be known as Philpot, Sherman & Co., and shall continue until dissolved by death of one or more of the parties, or by mutual consent, said dissolution to be noticed for ten days previous in the Titusville newspapers before taking effect; and is further understood that the parties to this agreement are to do all they can to forward the interests of this concern; and it is hereby agreed that they will, each and every one, use their utmost endeavors to that end.

In witness whereof we have hereunto set our hands and seals the day and date herein written.

B. PHILPOT. [SEAL.]
GEO. J. SHERMAN. [SEAL.]
H. E. PICKET. [SEAL.]

Witness:

J. H. GANETUN, as to Philpot & Picket sig.

(Indorsed:) Copartnership. P., S. & Co.

157 The defendants then called as a witness M. S. THOMPSON, who, being duly sworn, testified as follows:

Testimony of M. S. Thompson.

In the year 1864 and 1865 I resided in Venango County, Pennsylvania, and I was a joint owner with Lawrence Gruninger of one-half of well No. 15 on the Smith Farm. Gruninger and I sold one-half of said well to the defendant Picket, for $64,000. At that time I knew nothing of such a firm as Philpot, Sherman & Co. Of this $64,000 $10,000 was paid down, and the balance was to be paid in 30 days. On the day the contract matured Picket came down and told Gruninger and myself that the money was on the way, and he wanted a few days. After considerable talk, Gruninger and I went by ourselves and consulted, and agreed what we would do, and afterwards returned, and we then agreed with Picket that we would not forfeit the contract that day, as Picket said if we did it would break him up; and we agreed that if he would pay us a bonus of
158 three thousand dollars we would give him three days longer to pay the money. He agreed to do so, and we gave him the three days' extention, and at the end of that time he came down and paid us off in full. During those conversations nothing was said in my hearing about the well No. 2 on the Coombs Lease. I think Peter B. Cushman was present during these conversations. Philpot was not there. I had never seen him then. Cushman was employed in the service of Gruninger. Capt. Gruninger spoke English well, and wrote and understood it, and was a man of great shrewdness, though not well educated. He had been a whaler, and had traveled all over the world.

[NOTE BY THE JUDGE.—The testimony of M. S. Thompson is not placed in its proper order in the bill of exceptions. It was, in fact, the last item of evidence offered on either side.—T. D.]

The plaintiff then gave in evidence to the jury an agreement
159 dated October 19, 1864, for sale of interest in well No. 15, Smith Farm, by Gruninger to Philpot & Picket, as follows:

Agreement Oct. 19, '64.—Smith Farm.

Memorandum of agreement made and concluded this nineteenth day of October, A. D. one thousand eight hundred and sixty-four, by and between Lawrence Gruninger, of Venango Co., State of Pennsylvania, of the first part, and B. Philpot & Henry E. Picket, of Titusville, Crawford Co., State of Penn., of the second part, witnesseth:

That for and in consideration of the sum of five thousand dollars (5,000) in hand paid to the party of the first part, the receipt whereof is hereby acknowledged, and twenty thousand dollars to be paid within twenty days from this date, and thirty-nine thousand to be paid within ten days from the date of the last payment, hath granted, bargained, and sold, and by these presents does grant, bargain, and sell unto the parties of the second part all his right, title, interest, and claim in the lease and lot No. 15 on the Smith Farm, on Cherry Run, Venango Co., Penn.,
upon which there is a flowing well of about 100 bbls., more or
160 less, of oil per day; said interest being one-half of the working interest, or one-quarter of all the oil produced upon said lease or lot. The new tank which is being put up by the first party the second parties agree to pay for.

In witness whereof the parties have hereunto set their hands & seals the day and date above written.

L. GRUNINGER. [SEAL.]
B. PHILPOT. [SEAL.]
H. E. PICKET. [SEAL.]

Witness:
J. W. JERMON.

[U. S. int. rev. stamp 5 c'ts can'd.]

Deposition of D. W. Prince.

The plaintiff then gave in evidence the deposition of D. Waite Prince, the defendants having stipulated that it might be read in evidence against the defendant Sherman as well as against the other defendants, as follows:

Deposition of D. WAITE PRINCE, taken on the 12th day of May, 1869, in the town of Lenox, Madison County, New York, before J. E. Terry, commissioner on behalf of plaintiff:

Interrogatory first. What is your name, age, occupation, and place of residence?

Answer to first interrogatory. My name is D. Waite Prince; I
161 am 39 years of age; I am a contractor; my place of residence is Oneida, Madison County, State of New York.

Interrogatory second. Do you know the parties to this suit, or either and which of them, and how long have you known them respectively?

Answer to second interrogatory. I know all the parties to this suit. I have known the plaintiff since the spring of 1865. First knew her then. First knew the defendants about the month of June, 1864. Have known them since that time.

Interrogatory third. Did you know Lawrence Gruninger in his lifetime; and if yea, state how long you knew him.

Answer to third interrogatory. I knew Lawrence Gruninger in his lifetime. First knew him in January or February, 1864. Knew him from that date until the time of his decease.

Interrogatory fourth. Do you know of said Lawrence Gruninger making any sale of certain oil interests which he owned or claimed to
162 own in the oil wells known as well No. 15, Smith Farm, Cherry Run, and well number 2, Coombs Lease, on the Blood Farm, in Venango County, Pennsylvania? If yea, when and to whom was such sale made; and if you had any conversation or conversations with said defendants, or either of them, in reference to such sale at the time or within five months after the said time of such sale, state with which of said defendants, and state what was said, and when such conversation or conversations occurred, as near as you can state.

Answer to fourth interrogatory. I was negotiating a sale of oil property with defendants (Brian, Philpot & Henry E. Picket being present) at Cherry Run, in October or November, 1864. I said to Philpot & Picket, I want as much as you pay Gruninger. Picket said they shouldn't pay Gruninger any more than they did me. Within two or three days afterwards Picket said to me, We have bought Gruninger's interest in
163 well 15, Smith Farm. I said, Did you pay more than you paid me. He said No; but we were obliged to buy his interest in well No. 2, Coombs Lease, Blood Farm, in order to accomplish purchase of well No. 15.

Interrogatory fifth. If anything was said in such conversation or conversations in reference to the price said defendants paid or were to pay for the said Gruninger's interest in said well No. 2, Coombs Lease, on the Blood Farm, state what was said in reference thereto; and if the said defendants gave any reason or reasons why they purchased said interest in said well No. 2, Coombs Lease, on the Blood Farm, state what such reasons were; and state, if you know, how much or what proportion of said well said interest was.

Answer to interrogatory fifth. Defendant Picket said in the last conversation mentioned: We had to buy Gruninger's interest in well No. 2, Coombs Lease, Blood Farm, and pay him $3,000 for it, in order to
164 accomplish the purchase of his interest in well No. 15, Smith Farm, Cherry Run. Gruninger's interest in well No. 2, Coombs Lease, was one-sixteenth.

Interrogatory sixth. Do you know whether or not the said defendants were copartners at the said time when said Lawrence Gruninger sold his said interests in said wells? and if yea, state whether they were copartners at that time; and if they were, state under what copartnership name, and what their business was, and where they were engaged in business. Were said defendants copartners under said firm-name during the fall of 1864?

Answer to interrogatory sixth. I know said defendants were copartners at the said time when said Gruninger sold his said interests in said wells; their copartnership name was Philpot, Sherman & Co.; their business was dealing in oil lands and oil wells. They were engaged in business at Titusville, Crawford County, Penn. Said defendants were copartners under said firm-name during the fall of 1864.

165 Interrogatory seventh. Do you know whether or not said defendants made any money on the said interest in well No. 15, Smith Farm, Cherry Run? and if you know state whether they made money, and if they did, state how or in what way; *any* if you heard said defendants, or either of them, say anything in reference to their making money on said interest, state what they said, where they said it, as near as you can state, and to whom?

Answer to interrogatory seventh. Some time in the month of March, 1865, or about that time, I had a conversation with defendant Picket at

the Smith Farm. I said to Picket, Did you make any money on the well, and did you get rid of it before it stopped flowing? He replied, we made the last transfer of the well two or three days before it stopped flowing. We had sold it and bought it back again twice, and had made money by the operations. This is all that I know about their making money on the said interest.

166 Interrogatory eighth. Do you know of a note for three thousand dollars having been given by Philpot, Sherman & Co. to said Lawrence Gruninger sometime during the spring of the year 1865? And if yea, state, if you know, where and the time when, as near as you can, said note was given; and if said defendants made any statements to you, or to any one in your presence and hearing, soon after said note was given, in reference to the giving of said note, or the consideration of the same, state what they, or either of them said, and to whom it was said.

Answer to interrogatory eighth. Some time in the spring of 1865 I was in the office of defendants at Titusville. Defendants Philpot & Picket being present I had a conversation with them. Picket said they gave a note of $3,000 to Gruninger in settlement for the Coombs interest; that he Picket, thoughtlessly gave the note; that they meant to pay for the interest when they could as well as not; that they had

167 never made anything out of the interest, and did not want to be forced to pay it until they were ready. I do not know where or when the note was given. This is all that I know about the note.

Interrogatory ninth. Do you, or did you know, how near the said wells No. 15, Smith Farm, Cherry Run, and No. 2, Coombs Lease, Blood Farm, were to the place of business of said defendants at the time of the sale of said interests by said Gruninger? and if yea, state how near or about how near they were to the defendants' place of business. State, if you know, whether said defendants were acquainted with the value of said well No. 2, Coombs Lease, on the Blood Farm, during the first half of the fall of the year, 1864. State, if you know, whether they had opportunities during the first half of the fall of the year, 1864, to ascertain the character and value of said interest in said well No. 2, Coombs Lease, on the Blood Farm. Had they such opportunities during the month of Obtober, 1864?

168 Answer to interrogatory ninth. Well No. 15, Smith Farm, Cherry Run, was about 10 miles, and No. 2, Coombs Lease, about 9 miles from the place of business of said defendants at the time of the sale of said interests by Gruninger. Defendants, during the first half of the fall of the year 1864, had every opportunity of being acquainted with the value of well No. 2, Coombs Lease. They were then there frequently at the well. They had the same opportunity of knowing the well in October, 1864.

Interrogatory tenth. Were you a member of the firm of Prince & Irwin in 1865, and, if so, did said firm execute an agreement with certain other persons with the intention of organizing thereunder an incorporated company in the State of Pennsylvania? If yea, state whether you have the original of such agreement, and if you have not, look at the paper hereto attached and *and* marked Exhibit A, and state whether the same is a copy of such agreement; and if you are un-

169 able to state positively whether it is a copy, state whether, according to your best information and belief, it is a copy of such agreement; and if you say it is a copy, or you believe or think it is a copy, please have the commissioner mark or identify the same as Exhibit A to your deposition, and state whether a company was formed according

to the terms of said agreement; and if it was not formed state why it was not formed; and if you have had any conversation with said defendants, or either of them, since the execution of said agreement in reference to the reasons why said company was not formed, state what was said in reference thereto, and if they gave any reason why said company was not formed, state what reason they, or either of them gave.

Answer to interrogatory tenth. I was a member of the firm of Prince & Erwin, in 1865, and said firm did execute an agreement with certain other persons, with the intention of organizing thereunder an incorporated company, in the State of Pennsylvania. I have not the
170 original of such agreement. Exhibit A, hereunto annexed, according to the best of my information and belief, is a copy of such agreement. There was no company formed according to the terms of said agreement; the company was not formed, because a company could not be formed according to the laws of Pennsylvania, under that agreement. I had a conversation with defendants since the execution of said agreement, in reference to the reasons why said company was not formed. I had a conversation with Philpot and Picket, in the last part of May, 1865, in Ph'a. They both said, in substance, the company can't be formed under this agreement, because the laws of the State forbid it. I had a conversation with Sherman, (def't,) at Titusville, in the fore part of June, 1865. He said, in substance, the same thing. I can't express the exact language in either case.

Interrogatory eleventh. State whether or not the plan of forming said company under said agreement was abandoned; and if yea, when,
171 and how long after the execution of said agreement, it was abandoned, because it could not be formed according to the laws of Penn., under that agreement, marked Exhibit "A."

Interrogatory twelfth. Was there a company formed, subsequent to the 6th day of May, 1865, by some of the parties to said agreement, and if yea, about how long after the said sixth day of May, 1865, and if you know, state by whom such company was formed, and the name by which it was called; and if it differed, state if you know wherein the same differed from the company proposed to be formed under said agreement.

Answer to interrogatory twelfth. There was a company formed subsequent to the 6th day of May, 1865, by Prince, & Erwin, & the def'ts Philpot, Sherman & Picket. I think it was formed the 29th day of May, 1865. The name of the company was either "The Philpot & Sherman Oil Company," or "The Philpot & Sherman Petroleum Company:" I am not certain which. This company differed from the one contemplated by the said agreement in the following particulars: E. C. Bradley
172 & Bro's entire interest, and the interests of Prince & Erwin, in the wells Lady Washington, Demming, Follet, Erwin, and Amazon, and Gruninger's interests, were *executed*, and an additional 5 acres of the Reynolds Farm, put in by defendant, included; the excluded interests being those mentioned in Exhibit "A."

Interrogatory thirteenth. If, in answer to the last previous interrogatory, you say there was a company formed after the said 6th day of May, 1865, different from the one proposed in and by said agreement, state whether you, or the said firm of Prince & Irwin, received any telegraphic dispatch from said Lawrence Gruninger, referring to a company or companies; and if yea, state whether such telegraphic dispatch is in your possession or under your control; and, if the same is not in your possession or under your control, look at the paper hereto attached, and marked Exhibit B, and state whether the same is a copy of such

telegraphic dispatch; and if you cannot state positively whether
173 it is a copy, state whether you believe the same to be a copy, and request the commissioner to mark the same as Exhibit B to your deposition. State what company is referred to or meant by the words in said dispatch: "Do not take the company."

Answer to interrogatory thirteenth. The firm of Prince & Erwin received a telegraphic dispatch from Lawrence Gruninger, referring to a company or companies. The dispatch is not in my possession or under my control. The paper hereunto attached, marked Exhibit "B," is a copy of the dispatch received; the words "Do not take the company," referred to the company actually formed.

Interrogatory fourteenth. State any other matter in your knowledge relative to the matters in controversy in this suit which may be of benefit to the plaintiff therein.

Answer to interrogatory fourteenth. I have no further statement to make.

174 [5-cent U. S. int. rev. stamp.] [5-cent U. S. int. rev. stamp.]

EXHIBIT A.

This agreement, made this twenty-first day of April, 1865, between Prince & Irwin, Philpot, Sherman & Co., and E. C. Bradley & Bro., all of Titusville, *Venango* County, Pennsylvania, witnesseth: That the said parties covenant and agree with each other to furnish the hereinafter-mentioned properties at the prices thereto attached, for the purpose of forming a stock company, the name and style of which shall be hereafter determined on.

Prince & Irwin agree, for their part, to furnish and put into said company the following interests, to wit: $\frac{1}{24}$ working interest—$\frac{1}{48}$ of the oil in the Lady Washington Well, and lease on the Blood Farm, producing about 65 barrels; $\frac{1}{16}$ working interest—$\frac{1}{32}$ of the oil in the Demming Well and lease on the John McClintock Farm, producing 25 barrels; $\frac{1}{16}$ working interest—$\frac{1}{32}$ of the oil in Follett Well, and lease on the McClintock Reserve, said well drilled and ready for testing; $\frac{1}{8}$ working interest—$\frac{1}{8}$ of the oil in the Erwin Well and lease on the McClintock Reserve,
175 producing 30 barrels; $\frac{1}{32}$ working interest—$\frac{1}{64}$ of the oil in the Amazon Well and lease on the Smith Farm, producing 40 barrels, and one other well going down; $\frac{1}{2}$ working interest—$\frac{1}{4}$ of the oil in well and lease No. 11, Smith Farm, producing 50 barrels. The price at which the above interests are to be put into the joint property of the company is to be $52,000.

Philpot, Sherman & Co. agree, for their part, to furnish and put into said company the following properties, to wit: $\frac{1}{8}$ land interest in the James A. Stevenson Farm, one well going down; 98 acres $\frac{1}{4}$ land interest in five acres of the Pit Hole Farm, known as the Reynolds Farm, being some 5 acres sold by them to Andrews & Byers, upon which two wells are to be put down at once; 10 acres in fee, part of said Reynolds Farm; 4$\frac{1}{4}$ acres in fee, part of the farm known as the Ackerman Farm, on Cherry Run, subject to a reservation of $\frac{1}{20}$ of the oil to the original proprietors. The price at which the above interests are to be put into the joint property of the company is to be $50,000.

176 E. C. Bradley & Bro. agree, for their part, to furnish and put into said company the following properties, to wit: $\frac{1}{16}$ working interest—$\frac{1}{32}$ of the oil in the Fee Well and lease No. 9, on the Smith Farm, now producing about 20 barrels per day, and one other well going

down, to be completed free of expense to the company; ¼ working interest—⅛ of the oil in three wells and leases, Nos. 9, 16, & 21, on the John McClintock Farm, said wells now going down, and to be completed and tested free of charge to the company; ¼ of the oil-land interest in the two half-acre leases on McClure Farm, Nos. 7 and 8 on Cherry Run, two wells going down; $\frac{1}{16}$ fee interest—$\frac{1}{32}$ of the oil in Lot No. 18, McFate Farm, 60 rods above Smith Farm, on Cherry Run, well down 600 feet. The price at which the above interests are to be put into the joint property of the company is to be $32,000; making in all, as the cost price of the property to be put in, $134,000. Each party is to
177 furnish necessary plans, surveys, brief of title, and conveyances at their own proper costs and charges. It is agreed that Philpot, Sherman & Co., are to take charge of the property, and to get a charter, and take all proper and necessary steps for the formation of the company, and procuring subscriptions to the stock of the same, in which the other parties are to assist, so far as they may be able.

The parties putting in producing interests are to retain the production until the sum of worth of the stock shall be sold, and the proceeds divided as hereafter mentioned, and then the production to be turned over to the company.

The par value of the shares of stock, and the subscription price for the same, shall be $5; and the capital stock shall be 60,000 shares, of which 5,000 shares shall be reserved for a working capital. As fast as the stock shall be sold and the money realized, the same shall be divided pro rata among the parties hereto; and after all expenses
178 of procuring the charter, and other necessary expenses and commissions shall have been paid, the entire profits are to be divided among the several parties hereto, pro rata, according to the several amounts put in by each, whether the said profits shall be in cash or in stock of the company.

The election of directors and officers of the company, and the full organization of the same is postponed for further consideration and agreement; and it is understood that if there should be a failure to make sale of sufficient stock to justify the organization of the company, then the interests and properties are to revert to their respective owners, and each party is to pay *their* pro rata share of the expense incurred.

In witness whereof the said parties have hereunto set their hands and seals, the day and date first above written.

PRINCE & ERWIN.
PHILPOT, SHERMAN & CO.
E. C. BRADLEY & BROTHER.

Witness:
GEORGE C. DUY.

179 [U. S. int. rev. stamp 5-cts.]

PHILAD'A, *May 6th*, 1865.

It is agreed this day that Lawrence Gruninger is to put into this company one-half the working interest, it being ¼ of all the oil in or to be produced from the lease and lot No. 11, on the Smith Farm, Cherry Run, on the same terms and conditions that the balance of the parties furnish their several properties, and also to take the same portion and pro rata of profits in the said company at and for the sum of thirty thousand dollars.

LAWRENCE GRUNINGER.

EXHIBIT B.

370] MAY 29TH.

PRINCE & IRWIN,
Hund. sixteen N. Ninth, Ph'a:

Do not take the company. You know my reason; shall keep my interest; have spoke to a N. Y. company. They want to buy mine and yours; will let you know as soon as they make an offer.

L. GRUNINGER.

180 Cross-interrogatories and answers thereto by the witness on the part of the defendant.

Cross-interrogatory first. If, in answer to the 4th and fifth direct interrogatories, you state that you know of the sale by Lawrence Gruninger to the defendants, or either of them, of any interest in well No. 15, Smith Farm, Cherry Run, and well No. 2, Coombs Lease, on the Blood Farm, state how you know the same; to whom the sales were made; were the contracts for said sales verbal or in writing; where are they? If you state that the defendants, or either of them, spoke of said wells, or either of them, state when, where, and who it was that made the statements. Have you, in your direct examination, stated all he or they said concerning said wells, and each of them? If not, state in full what was said by them, or either of them, on that occasion respecting each of said wells.

Answer to cross-interrogatory first. I know of the sale of well
181 No. 15, Smith Farm, to defendants by the conversations detailed in answers to interrogatories 4th & 5th, and by the fact that I was present when the title to said well was delivered to Philpot, Sherman & Co.; that is, it was delivered to Picket; and I know of the sale of well No. 2, Coombs Lease, only from information gathered in said conversations. I do not know whether said sales were verbal or in writing. The time said conversations were had was in October or November, 1864, at Cherry Run. It was Picket that made the statements. I have stated all that was said in said conversations concerning the wells that I recollect, excepting that I now remember that Picket said, in the last conversation, "I don't expect that Coombs well is worth what I paid for it; but we were obliged to buy it in order to get 15, Smith Farm."

Cross-interrogatory second. If, in answer to the 6th direct interrogatory, you state that the defendants were copartners, state whether you know that they, as such copartners, entered into any contract or contracts for the purchase of any interest in said well or wells.
182 Were not the contracts in writing, and were they not signed by B. Philpot and H. E. Picket, and not by Sherman? If you say they were not signed by Philpot and Picket only, state how you know.

Answer to cross-interrogatory second. All that I know about the contracts for the purchase of any interest in said wells is detailed in my answers to the 4th & 5th interrogatories and the fact that I was afterward present when Gruninger executed a title to well No. 15 to Philpot, Sherman & Co., and delivered it to Picket. I don't know whether the contracts were in writing or not.

Cross-interrogatory third. If, in answer to the 7th direct interrogatory, you state that the defendants, or either of them, said they had made money out of the well No. 15, Smith Farm, state what he or they said; also about the well No. 2, Blood Farm. Did not he or they say it was worthless? Have you not said it was worthless? Do you not know

it was worthless? What have you said about it, and what do you know about it?

183 Answer to cross-interrogatory third. I don't remember as anything was said about well No. 2, Blood Farm, in the conversation referred to in reply to direct interrogatory 7th; but some time afterward—after the 6th of May, 1865, I had a conversation with Picket in Philpot, Sherman & Co.'s office, in Titusville. Pickct said they had never realized anything from well No. 2, Coombs Lease. I don't know that he or they said it was worthless. I have not said it was worthless at the time of the sale. I do not know it was worthless. I have said nothing about it more than is here stated, that I recollect; the well was not worthless at the time of the sale.

Cross-interogatory fourth. If, in answer to the 8th direct interrogatory, you state that the defendants, or either of them, said anything about a note of $3,000, as supposed in said interrogatory, state when, where, and by whom it was said, and all that he or they said on the subject. Do you not know that the whole or chief consideration of said note was, that the said Lawrence Gruninger should go into the

184 company proposed to be formed, and put in his property, as provided in the contract of May 6th, 1865, appended to that of April 21st, 1865, copies of which accompany the plaintiff's interrogatories? Is not the said contract of Gruninger of the same date as the notes? Were they not made at the same time? What do you know about the reason of their bearing the same date? How did they come to be made at the same time?

Answer to cross-interrogatory fourth. The conversation mentioned in the answer to the 8th direct interrogatory took place in the spring of 1865, at the office of the defendants, in Titusville, Penn., and was said by Picket, and the said answer contains all that I recollect on the subject. I do not know that the whole or chief consideration of said note was that the said Laurence Gruninger should go into the company proposed to be formed, and put in his property as provided in the contract of May 6th, 1865, appended to that of April 21, 1865. I do not know whether the said contract of Gruninger is of the same date

185 as the note. I don't know whether they were made at the same time or not. I don't know anything about the reason of their being of the same date. I can't tell how they came to be made at the same time.

Cross-interrogatory fifth. If, in answer to the 9th direct interrogatory, you state that the defendants were acquainted with and knew the value of well No. 2, Blood Farm, state how you know it, and when and how they became acquainted with it. Do you not know that the said Lawrence Gruninger represented to the said defendants, or some of them, that the same was a good producing well? What do you know of the representations of the said Lawrence Gruninger in relation to the production of said well made to the said defendants, or any of them? Do you not know, as a matter of fact, that said well No. 2, Blood Farm, was worthless, and never paid expenses during 1864, or thereafter?

Answer to cross-interrogatory fifth. All that I can state is that the defendants, and each of them, were at well No. 2, Blood Farm, frequently, during the fall of 1864. I do not know that the said

186 Lawrence Gruninger represented to the said defendants, or some of them, that the same was a good producing well. I know nothing of the representations of Lawrence Gruninger in relation to the production of said well to the said defendants, or either of them. I do not know, as a matter of fact, that said well No. 2, Blood Farm, was

worthless, and never paid expenses during 1864. Afterwards it became worthless.

Cross-interrogatory sixth. If, in answer to the 10th interrogatory, you state that a company was not formed pursuant to the agreement in said 10th interrogatory referred to, state if the said defendants were not ready and willing to enter into and form such company, and if the said Lawrence Gruninger did not refuse to go into and form said company, and put in his property; and did not the said defendants exert themselves to have said company formed; and did they not contribute and put into the company their property, as provided in said agree-
187 ment; and did not said Gruninger, after agreeing to go in, refuse so to do; and did he not telegraph to your firm to that effect? What despatch did he send your firm on that subject, and what did you do in consequence of receiving such despatch? If you state that the defendants, or either of them, made any statement touching the forming of said company, state when, where, and by whom the same was said, and all they or each of them said on the subject.

Answer to cross-interrogatory sixth. I cannot say that the defendants were not willing to enter into and form such company, and ready to do so. Philpot & Picket, at Ph'a, both said, in conversation with me, that in investigation in relation to the charter of the company, they had found the company could not be formed under the laws of that State incorporating the property described in the contract, (referring to contract of which Exhibit "A" is a copy.) Lawrence Gruninger did not refuse, to my knowledge, to go into and form said company, and
188 put in his property. The defendants did exert themselves to have said company formed. They did contribute and put into the company their property, as provided in said agreement. Gruninger did not, to my knowledge, after agreeing so to do, refuse to go in. He did not telegraph to our firm to that effect. He sent the despatch hereto attached, marked Exhibit "B," but there was nothing in that despatch referring to the said company. I did nothing in consequence of receiving that despatch but what I would have done had I not received it. The last-mentioned conversation with Philpot & Picket was had about the last of May, 1865.

Cross-interrogatory seventh. Do you not know that, as a matter of fact, a company was formed under said agreement, and did not your firm go in and put your property in, as you agreed to do, while said Gruninger refused to go in and put his property in? If you say it was abandoned, what do you mean by abandonment? Who did it; how was it done; why was it done? Did not you and the de-
189 fendants, and others interested, go on and obtain a charter and organize a corporation? Was not your firm, or some member thereof in its behalf, a stockholder and a director in said company? Who of them was such stockholder and director? From your knowledge, is it or not your opinion that the refusal of Gruninger to go into the company was a great damage and injury to defendants? What is your opinion on that subject?

Answer to cross-interrogratory seventh. I do know that a company was not formed according to or under said agreement, and my firm did not go in and put in our property, as we agreed to do. The proposition of forming a company, under that agreement, was abandoned. I mean by abandoned, that the project was a failure, by consent of parties, under advice that it could not be legally formed according to that agreement, under the laws of Pennsylvania. Philpot & Picket, myself, & Erwin, & E. C. Bradley, and his brother, were all present at

190 the time of the abandonment, and it was abandoned by the consent of all present. Prince & Erwin, & Philpot, Sherman & Co. did go on, obtain a charter, and form a corporation. My firm was a stockholder, and I was one of the directors in this corporation, which was formed. As a company could not be formed, it is my opinion that a refusal of Gruninger to go into the company could not work any damage or injury to the defendants.

Cross-interrogatory *seventh*. If, in answer to the 13th direct interrogatory, you state that you received a dispatch of the kind, in said interrogatory stated, from said Lawrence Gruninger, do you know why said Gruninger sent said dispatch? Did you not and do you not understand by said dispatch that the reason of said Gruninger's refusal to go into said company, according to his agreement, was because he had had what he deemed a more advantageous offer from a New York company? What were the reasons that Gruninger, in the dispatch,
191 said you knew, and when did you learn thereof, and how? Were those reasons any failure, neglect, or omission, on the part of the defendants, to perform their agreement, and if so, what was such failure?

Answer to cross-interrogatory *seventh*. I knew why Gruninger sent the dispatch. I did not and do not understand, by said dispatch, that the reason of said Gruninger's refusal to go into said company, according to agreement, was because he had had what he deemed a more advantageous offer from a New York company. I suppose the reasons that Gruninger said in the dispatch, You know, to be that he would have nothing more to do with Philpot, Sherman & Co., because he alleged that they had not done as they had agreed with him. I learned of these reasons by correspondence with him, by mail, some time during the latter part of May, 1865. Those alleged reasons were not on account of any failure, neglect, or omission, on the part of the defendants,
192 to perform their agreement set forth in Exhibit "A."

Cross-interrogatory eighth. If his failure and refusal to go in was because E. C. Bradley & Bro. did not put in their property, do you not know that they were excluded, or not received, because their property was found to be poor, and not productive, or because their going in would have given them stock without adequate consideration, and so a damage to the company? Did you not object to their going in? If yea, for what reasons?

Answer to cross-interrogatory eighth. I did not object to E. C. Bradley & Bro. going in. The only reason that they did not go in, to my knowledge, was that their interests, mentioned in the agreement, being fractional interests, could not be used as the basis of a corporation under the laws of Pennsylvania. I never knew that Gruninger raised any objection to E. C. Bradley & Bro's property.

Cross-interrogatory ninth. Do you not know that the purchase of the interest in well No. 15, Smith's Farm, was a separate and inde-
193 pendent transaction by itself? Was not that transaction fully closed up by itself? Did you not go, in company with the defendants Picket, and Lawrence Gruninger, and a Mr. Thompson, from Gruninger's office, on the Smith Farm, over to the Blood Farm, to the office of a notary public, and did not said Picket there pay over the money to Gruninger in full for the interest in well No. 15, Smith Farm; and did not Gruninger there execute a conveyance of the same, and acknowledge it before a notary public? State fully what was done in and about the subject-matter of this interrogatory.

Answer to cross-interrogatory ninth. I do not know that the purchase

of well No. 15, Smith Farm, was an independent transaction by itself. That transaction was closed up by itself. I did go, in company with Picket. Gruninger, and Thompson, from Gruninger's office, on Smith Farm, to a notary public or justice of the peace, on Blood Farm. Picket then paid over the money in full for interest in well No. 15,
194 Smith Farm. Gruninger there executed a conveyance of the same, and acknowledged it before said notary or justice.

D. WAITE PRINCE.

The plaintiff then gave in evidence the deposition of PETER B. CUSHMAN, the defendants having stipulated that it might be read in evidence, as well against the defendant Sherman as against the other defendants, as follows:

Deposition of P. B. Cushman.

Deposition of Peter B. Cushman, taken May 18th, A. D. 1869, before Wendell H. Cobb, commissioner, at Attleboro, Bristol County, Massachusetts, on behalf of plaintiff.

Interrogatory first. What is your name, age, occupation, and place of residence?

Answer to 1st interrogatory. My name is Peter B. Cushman; aged thirty-six years; by occupation a farmer, and engaged in the retail grocery business; and I reside in Attleboro, Massachusetts.

Interrogatory second. Do you know the parties to this suit, or either, and which of them, and how long have you known them respec-
195 tively?

Answer to 2nd interrogatory. I know Mrs. Alice B. Gruninger, the plaintiff, and Brian Philpot and Henry E. Picket. I do not
196 know George J. Sherman. I have been acquainted with Mrs. Gruninger all my life. I first became acquainted with Philpot & Picket in 1864, when they came to purchase well No. 15, Smith Farm, Pennsylvania, and well No. 2, Blood Farm.

Interrogatory 3rd. Did you know Lawrence Gruninger in his lifetime? if yea, state how long you knew him, and when he died, and where he was living, and what was his age at the time of his death. Was he known and called by any title? If you say he was known and called by the title of captain, state how he acquired such title. Was he an American by birth? If not, state of what country he was a native, and whether he ever acquired a good knowledge of the English language.

Answer to the 3rd interrogatory. I did know Lawrence Gruninger; was acquainted with him for ten years. He died November 9th, 1867, at Attleboro, Mass., where he was living at the time, aged about fifty years. He was known as Captain Gruninger, which title he ac-
197 quired by being a master of a whale ship. He was not an American by birth. He was a native of France. He could read and write the English language.

Interrogatory 4th. Do you know of said Lawrence Gruninger making a sale or sales of certain oil interests, which he owned or claimed to own in the oil wells known as No. 15, Smith Farm, Cherry Run, and well No. 2, Coombs Lease, on the Blood Farm, in Venango County, Pennsylvania? If yea, when, to whom was such sale or sales made; and if you have had conversations with said defendants, or either of them, in reference to such sale or sales, state which one or ones, and state what was said where such conversation occurred.

Answer to 4th interrogatory. I do know of the sales referred to. In

the year 1864, I think it was in the fall, well No. 15, Smith Farm, and well No. 2, Coombs Lease, Blood Farm, were sold to Philpot, Picket & Co., as I always understood. I have not had any conversations
198 with either of said defendants in reference to such sales.

Interrogatory 5th. Did you hear any conversation between said defendants or either of them and said Lawrence Gruninger in reference to the sale of said interest; and if yea, state what was said in reference to such sales, and when? Did you hear said defendants make any statements in relation to the purchase of said interests in said wells, or give any reason why they purchased said interests or either of them? If yea, state what such statements were, and what reasons were given for the purchase of either of said interests. And state to whom, if you know, and when, as near as you can recollect; and if any statements were made by said defendants or either of them, about being able to dispose of such interest in said well No. 2, Coombs Lease, on the Blood Farm, state what was said, and by whom, and when.

Answer to 5th interrogatory. I heard Captain Gruninger say to
199 Mess. Philpot & Picket that they could not have well No. 15, Smith Farm, unless they took No. 2, Coombs Lease, Blood Farm. This was in a house on the hill on Captain Gruninger's lease, just before they purchased said wells. Shortly after this I heard Mr. Philpot say to some persons, who were looking at said well No. 15, that they bought this lease, and a small lease of well No. 2, Blood Farm; that they knew of parties to who' they could sell well No. 2. I did not know the parties with whom Mr. Philpot was talking.

Interrogatory 6th. If, in answer to either of the previous interrogatories, you shall say that you know of a sale or sales of said interests in said well No. 15, Smith Farm, Cherry Run, and said well No. 2, Coombs Lease, on the Blood Farm, state whether you know anything in regard to the character and value of such interests, or either of them, at the time of such sale or sales. If yea, state what you know in regard to their character and value.

200 Answer to 6th interrogatory. Well No. 15 was worth a large sum of money; I should say it was worth ($80,000) eighty thousand dollars at that time. Well No. 2 was not worth nearly as much, because it was not pumping so much. It varied from 16 to 25 barrels of oil per day. It was worth all that Philpot & Picket paid for it, and more too. Well No. 15 was running about 140 barrels per day when they bought it, and that increased to 160 barrels per day.

Interrogatory 7th. State whether or not said defendants, or either of them, were acquainted with the character and value of said interests in said well No. 2, Coombs Lease, on the Blood Farm, and said well No. 15, Smith Farm; or had they or not any opportunity of becoming acquainted with their character and value during the first half of the fall of the year 1864?

Answer to 7th interrogatoy. Both of them were acquainted with
201 well No. 15, Smith Farm, and I think that Mr. Philpot was acquainted with well No. 2, Coombs Lease. They had the privilege of going & looking at them and inquiring about their value before purchasing. That was the usual custom.

Interrogatory 8th. Do you know whether the said well No. 2, Coombs Lease, on the Blood Farm, was, at the time of such sale, a producing well; if yea, state whether or not it was a producing well, and if it was, state how much it produced per day.

Answer to 8th interrogatory. I do know that it was a producing well; I helped put it down; did most of the drilling. It was a producing

well, and at the time of the sale it was producing from (16) sixteen to (25) twenty-five barrels per day.

Interrogatory 9th. State whether or not you heard any conversation between said Lawrence Gruninger and said defendants, or either
202 of them, during the fall of the year 1864, or the winter following, in reference to when said interest in said well No. 2, Coombs Lease, on the Blood Farm, should be paid for? If yea, state with which defendant or defendants said Gruninger had such conversation, and when and what was said.

Answer to 9th interrogatory. I only heard Mr. Philpot say this to Mr. Gruninger: "The money is on the road and will be here in two or three days; you must give us a little longer time in case it does not get here. Anyhow you must give us longer time on the Coombs Lease;" and further, he said this, "Captain, if you do hold us to our bargain you will ruin us. If you will hold on & give us a little longer time we will make you a present."

Interrogatory 10th. State any other matter in your knowledge relative to the matters in controversy in this suit which may be of benefit to the plaintiff therein.

Answer to 10th interrogatory. I don't know as I know any-
203 thing further, only they have not paid their money on the Coombs Lease; that is all.

Cross-interrogatories to the witness on the part of the defendant and answers thereto by said witness:

First cross-interrogatory. When did the said Lawrence Gruninger come to America? Where did he reside from that time until his death? For how many years did he use the English language in speaking and writing? Has he any difficulty in speaking or hearing English so as to understand and be understood, in the years 1864 and 1865?

Answer to 1st cross-interrogatory. I cannot tell; he must have been here previous to 1830. He lived in New Bedford and in Attleboro; was living in Attleboro when he died. He always spoke and wrote the English language since I have known him. If any one talked slowly and plain to him he would have no difficulty in understanding them, but you would need to watch him pretty closely in order to understand all that he said.

204 2nd cross-interrogatory. If, in answer to the 4th direct interrogatory, you say you know of said Lawrance Gruninger making a sale or sales of oil interest he had or claimed in well No. 15, Smith Farm, Cherry Run, and well No. 2, Coombs Lease, on the Blood Farm, Venango County, Pennsylania, state how you know of such sale or sales; were you present when it or they were made; were the contract or contracts verbal or in writing; if in writing, did you see them executed; where are they; who, of the defendants, did you talk with or hear talk on the subject, and when and where, and who else was present at the conversation. Have you stated, in your direct examination, all he or they said on the subject; if not, what further did he or they say?

Answer to 2nd cross-interrogatory. I know of the said sales in this way: I heard the conversation I have referred to, in answer to the 5th direct interrogatory; the same afternoon Captain Gruninger went up to Titusville, and the next morning returned and told me
205 that the bargain was closed, and he had got the writings for the wells. I did not see any contract in writing; I did not hear any further conversations on that subject.

Third cross-interrogatory. If, in your examination in chief, you have testified that you know anything in reference to the character and value of the interest of said Lawrence Gruninger in said wells, state how you know the same; what was the interest worth in the well on the Smith Farm; what was the interest worth in the well on the Coombs Lease, Blood Farm; how do you know what they were worth; did you ever see either or both of said wells, and which and when; are you a good judge of the value of such property; and when and how did you acquire your knowledge on the subject?

Answer to third cross-interrogatory. I know the character of these wells at that time by working on them, and I know their value by being in the vicinity of these and other wells, and knowing the prices for which wells were selling. I consider the interest in the well on
206 Smith Farm, worth at that time about eighty thousand dollars; well on Coombs Lease, Blood Farm, was worth all they agreed to pay for it, $3,500 00. I put down both of these wells or helped put both of them down; I consider myself a good judge of the true value of wells at that time, from the knowledge that I obtained by being there and boring, and observing the sales & purchases that were being made.

Fourth cross-interrogatory. If, in answer to the 7th direct interrogatory, you state that the defendants, or either of them, were acquainted with the character and value of said wells or either of them, state which of them was so acquainted, and how you know thereof; what was the extent of their knowledge and acquaintance, and how did they acquire the same?

Answer to 4th cross-interrogatory. All I know & judge from is by their being around other wells, and being up and down the creek there where these wells were.

207 Fifth cross-interrogatory. If you state that the well No. 2, Blood Farm, was a producing well, state how you know thereof; how often have you seen it, and when; how many days' product thereof do you know; do you know whether it paid expenses or not; have you not heard the said Lawrence Gruninger say it did not pay expenses.

Answer to fifth cross-interrogatory. I know that well No. 2 was a producing well, because I staid by it night and day and worked it; I was there from the time we commenced working on it tell the captain told me he had sold it; I should think it was as much as two months; I never heard Lawrence Gruninger say it did not pay expenses; I don't see how it could help paying expenses.

Sixth cross-interrogatory. If, in answer to the 9th direct interrogatory, you say you heard defendants or any of them say when the interest in well No. 2, Blood Farm, should be paid for, state where such conversation was had; who were present; how do you know the
208 person who had the conversation was one of the defendants; did you know him; how long had you known him; how did you become acquainted with him; have you stated all he said on the subject? If not, state what else he said.

Answer to 6th cross-interrogatory. I know nothing more than I have stated in my answer to the 9th direct interrogatory. I only know who Mr. Philpot was by Captain Gruninger's telling me at the time who Mr. Philpot was. I think I have been introduced to Mr. Picket, but not to Mr. Philpot. I only know them from seeing them when they were on the creek looking at the wells, and in the captain's office, and having them pointed out to me by the captain.

PETER B. CUSHMAN.

The plaintiff then intervened and gave in evidence a certificate from the secretary of state of the State of Pennsylvania, as follows:

209 *Certificate from secretary of state.*

This is to certify that we, the subscribers, Brian Philpot, George J. Sherman, Charles A. Day, and George T. Barnes, all of the city of Philadelphia, and State of Pennsylvania, Henry E. Pickett, of Titusville, in the county of Crawford, being joint owners of the tract of mineral and oil lands hereinafter described, situate in the county of Venango, in the said State of Pennsylvania, and such other persons as may hereafter become associated with them therein, are desirous of forming a company with corporate powers under the provisions of an act of the assembly of the Commonwealth of Pennsylvania, approved the twenty-first day of April, A. D. 1854, entitled "An act to enable joint tenants, tenants in common, and adjoining owners of mineral lands in this Commonwealth to manage and develop the same," and the several supplements thereto, for the purpose hereinafter set forth; and do make this certificate in writing, agreeable to the provisions of said act, and do agree—

210 First. That the corporate name of such company proposed to be formed shall be the "Philpot and Sherman Petroleum Company."

[5-c. U. S. rev. stamp.]

Second. That the object for which said company is formed is to develop, improve, mine, and bore said lands described, and others which may hereafter be acquired by said company, (if any should be,) in order to procure mineral and carbon oils, and manufacture, refine, sell, and convey to market the products thereof, or to sell the same without manufacturtng or refining, as may be thought best.

Third. The land of which the undersigned are the joint owners, is located and described as follows, viz: All that certain tract, piece, or parcel of land situate, lying, and being in Cornplanter Township, Venango County, State of Pennsylvania, part of tract No. 121 of the Holland Land Company's survey, and part of the farm known as the

211 Reynolds Farm, located in said tract, described and bounded as follows, to wit: Beginning at a point which is forty-eight rods south of the north line of said farm, and eighty-eight and two-tenth' rods east of the west line of said farm; running thence southwardly parallel with the east line of said farm sixty-four rods, to a post; thence westwardly parallel with the north line of said farm, to a point which is sixty-two and five-tenth' rods east of the west line of said farm; thence northwardly parallel with said west line sixty-four rods; and thence eastwardly parallel with the north line of said farm twenty-five and seven-tenths rods, to a post, the place of beginning; containing ten acres of land, be the same more or less, being the same premises conveyed to said Henry E. Picket by Henry Hinckley by deed dated A. D. 1865, (now lodged for record,) in fee; and said Pickett, by deed dated May first, A. D. 1865, granted forty-one sixtieths thereof to Philpot, Sherman, Duy, & Barnes.

212 Fourth. The number of shares into which said land is divided is sixty thousand shares of the par value of five dollars each, and the said shares are held and owned by the said parties as follows, to wit:

Brian Philpot, of the city of Philadelphia, twenty thousand shares.

George J. Sherman, of the city of Philadelphia, nineteen thousand shares.

Henry E. Picket, of Titusville, Pennsylvania, nineteen thousand shares.

Charles A. Duy, of the city of Philadelphia, one thousand shares.

George T. Barnes, of the city of Philadelphia, one thousand shares.

Fifth. The chief operations of the company are designed to be carried on in the said county of Venango, and the principal office or place of business is to be in the city of Philadelphia aforesaid.

Sixth. The directors who shall manage the affairs of the company until the next annual election shall be five in number, and shall consist of the following named persons: Brian Philpot, George J. Sherman,
213 Henry E. Picket, Charles A. Duy, and George T. Barnes.

Seventh. The said corporation shall continue for the period of twenty years.

In witness whereof we, the parties above named, have hereunto set our hands and seals this second day of May, in the year of our Lord one thousand eight hundred and sixty-five (1865.)

(S'g'd)	BRIAN PHILPOT.	[SEAL.]
(S'g'd)	GEOR. J. SHERMAN.	[SEAL.]
(S'g'd)	CHAS. A. DUY.	[SEAL.]
(S'g'd)	GEO. T. BARNES.	[SEAL.]
(S'g'd)	HENRY E. PICKET.	[SEAL.]

Witnesses at signing—

(S'g'd) JOHN WHITE.

(S'g'd) W. BARNET LEVAN.

(S'g'd) STERLING BONSALL.

(S'g'd) B. S. MCALLISTER, as to the signature of Henry E. Picket.

On this second day of May, anno Domini 1865, before me, the subscriber, an alderman in and for the city of Philadelphia, personally appeared Brian Philpot, George J. Sherman, Charles A. Duy, George T. Barnes, in the foregoing certificate named, and acknowledged
214 the same to be their and each of their act and deed, and desired the same as such might be recorded according to law.

Witness my hand and seal the day and year aforesaid.

[SEAL.] (S'g'd) JOHN WHITE,
Alderman.

On this sixth (6) day of May, anno Domini 1865, before me, B. S. McAllister, a justice of the peace for Crawford County, Pa., personally appeared Henry E. Picket, in the foregoing certificate named, and acknowledged the same to be his act and deed, and desired the same as such might be recorded according to law.

Witness my hand and seal the day and year aforesaid.

[SEAL.] (S'g'd) B. S. MCALLISTER, *J. P.*

[5-ct. U. S rev. stamp.]

OFFICE OF ATTORNEY GENERAL,
Harrisburg, May 15th, 1865.

I certify that I have perused and examined the foregoing certificate or articles of agreement and association of the Philpot and
215 Sherman Petroleum Company, and am of opinion that they are

properly drawn and signed, and that the same are in conformity with the constitution and laws of the commonwealth.

(S'g'd) W. M. MEREDITH,
Attorney General.

[5-ct. U. S. rev. stamp.]

COMMONWEALTH OF PENNSYLVANIA,
Venango County:

I, H. B. Gordon, recorder in and for the county aforesaid, do hereby certify that the above is a true copy of certificate of the Philpot and Sherman Petroleum Company, as recorded in my office in charter book No. 3, page 7.

In testimony whereof I have hereunto set my hand and seal of said office at Franklin, this 19th day of May, A. D. 1865.

[SEAL.] (S'g'd) H. B. GORDON,
Recorder.

[5-ct. U. S. rev. stamp.]

Recorded and filed in the office of the secretary of the Commonwealth, at Harrisburg, on Thursday, the 25th day of May, A. D. 1865.

[SEAL.] (S'g'd) ELI SLIFER,
Sec. of the Commonwealth.

216 OFFICE OF THE SECRETARY OF THE COMMONWEALTH,
Harrisburg, October 27th, A. D. 1869.

PENNSYLVANIA, *ss:*

I do hereby certify that the foregoing and annexed is a full, true, and correct copy of the original "Certificate of the organization of the Philpot and Sherman Petroleum Company," as the same remains on file in this office.

{ SEAL OF SECRETARY'S OFFICE. }

In testimony whereof I have hereunto set my hand and caused the seal of the secretary's office to be affixed the day and year above written.

J. M. WEAKLEY,
Deputy Secretary of the Commonwealth.

217 COMMONWEALTH OF PENNSYLVANIA:

JOHN W. GEARY, governor of the said Commonwealth, to all to whom the presents shall come, sends greeting:

Know ye, that the attestation or certificate hereunto attached is in due form, and made by the proper officer, and that J. M. Weakley, whose name is subscribed thereto, was at the time of subscribing the same, and now is, a deputy secretary of the Commonwealth, duly appointed and commissioned, and full faith and credit are due and ought to be given to his official acts accordingly.

{ SEAL OF THE STATE OF PENNSYLVANIA. }

Given under my hand and the great seal of the State at Harrisburg, the 27th day of October, in the year of our Lord one thousand eight hundred and sixty-nine, and of the Commonwealth the ninety-fourth.

JNO. W. GEARY,
Governor.

218 By the Governor:

J. M. WEAKLEY,
Deputy Secretary of the Commonwealth.

Testimony of A. Erwin.

The plaintiff then called as a witness ALBERT ERWIN, who, being duly sworn, testified as follows:

I live in Pennsylvania, 30 miles from Titusville, and was one of the firm of Prince & Erwin, who signed the agreement of April 21, 1865. We were in the oil business at different places on Oil Creek. We had no office at Titusville. I have known the defendants since the early part of the fall of 1864. I also knew Gruninger. I knew well No. 2 Coombs Lease. I don't know that I knew the value of it in October, 1864. I think it was worth something. An oil well was worth from two to four thousand dollars per barrel for what it would produce per day. I think it was paying in the fore part of the fall. We sold one interest in August, 1864. It was then considered a promising well. A well producing 16 barrels per day would be considered a valuable well, not
219 worthless. Picket lived in Titusville in the fall of 1864. I met him frequently on Oil Creek. Philpot & Picket had opportunities of ascertaining the value of the well in the fall of 1864. I don't know whether or not the defendants were partners. I supposed they were partners when we sold our interest in well 15 in the fall of 1864, & I was not in Philadelphia on May 6, 1865, or before that, in that spring. I was not present when the note or contract of May 6, 1855, were made. No corporation was formed exactly under the agreement of April, 1865. The project was abandoned. I cannot tell why it was abandoned. I think its abandonment was by mutual agreement, except by Bradley. We were to retain the product until we got pay. We put in producing interests in the company that was formed. The words "Do not take the company," in the telegraphic despatch given in evidence, refer to the company actually organized. I think Gruninger was willing to go into a company under the
220 agreement of April 21, 1865. It was safe to do so. He refused to go into a company after this plan was abandoned. Coombs & Gruninger had a difficulty. We never received any money from the sale of stock in the company that was formed. I never said that the telegraphic dispatch above spoken of referred to the company proposed to be formed under the agreement of April 21, 1865.

The said Albert Erwin, being cross examined by the defendants, testified as follows:

I am not able to say what well No. 2, Coombs Lease, was producing on the 19th of October, 1864. A good many wells yield one day and nothing the next; I cannot say what it was yielding on or about that time; it might have been sold on execution, but I don't know it. The difficulty between Coombs & Gruninger would not, in my opinion, cause Coombs to swear falsely against him; it may be that the partnership of Philpot Sherman & Co. did not commence until 8th November, 1864; I have no knowledge when the partnership was formed, Philpot
221 & Picket paid us $60,000 for one-half of well No. 15, Smith Farm; I think it was its fair market value; they paid Gruninger $64,000 for the other half; Peter B. Cushman worked for Gruninger; Prince wrote the conveyance of well No. 2, Coombs Lease, to Philpot, Sherman & Co.; the company under the April agreement was abandoned; I cannot say it was abandoned before the 20th of May; I don't know what company Capt. Gruninger referred to as a New York company, in his despatch of May 29, 1865; I was out in Iowa during the spring of 1865, and got back to Philadelphia after May 15, 1865; It was on the

night before or the night after the great review of the army at Washington, (which the parties will agree was on the 23d of May, 1865;) I cannot say when Capt. Gruninger left Pheladelphia; the first knowledge I had of the abandonment of the organization of the company under the agreement of April 21, was after I returned to Philadelphia from the West; I cannot tell whether Grunninger was there when
222 I got there or not; I did not hear any conversation of Philpot, Sherman & Co., or any of them, or know of any act about the abandonment of the company; I don't remember whether Capt. Gruninger got to Philadelphia before or after I did; Bradley objected to the abandonment; I did not hear Philpot, Sherman & Company object.

The said witness being reëxamined by the plaintiff testified:

Wells that have ceased yielding sometimes commence again and become valuable. I did not ascertain from the defendants after I got to Philadelphia that the company had been abandoned; my impression is that I got it from Duy or Bonsal.

The plaintiffs then gave in eivdence a letter written by the defendant Picket to said Lawrence Grunınger, dated February 24, 1865, the signature thereto being admitted by defendants' counsel, as follows:

Letter of Picket, Feb. 24, '65.

B. PHILPOT. GEO. J. SHERMAN. H. E. PICKET.

[Philpot, Sherman & Co., real-estate brokers and oil-land agents, Titusville, Pa.
223 Office over Petroleum Bank. Branch office No. 142 South 4th street, Philadelphia.]

OFFICE OF PHILPOT, SHERMAN AND CO.
Titusville, Pa., Feb. 24th, 1865.

Capt. L. GRUNINGER.

DEAR SIR: I have just learned this evening that you had returned from Massachusetts. We rec'd a letter from you some time since which I intended to answer at once, but kept neglecting it on acc't of press of business until it passed my mind entirely. I am glad to learn that you have got back among us, and hope that you will be able to come and see us before long.

I think we can fix up that Blood Farm matter satisfactorily when you come up. If we can do anything to your advantage we shall be glad to do so.

Yours truly,

H. E. PICKET.

While presenting the case to the jury, his honor the judge en-
224 quired of the counsel for the defendants if any special defence was relied upon for any one defendant that was not available for all the defendants; to which the counsel for the defendants replied that there was not.

This was all the testimony on either side. And thereupon the court orally charged the jury, of which the following is in substance a correct report:

Charge of court.

Circuit court of the U. S., northern dist. of Illinois.

ALICE GRUNINGER, ETC.,
v.
PHILPOT ET ALS.

DRUMMOND, J.

GENTLEMEN: These parties, the deceased, Lawrence Gruninger, and Philpot and Pickett, the defendants, and Sherman, but particularly Philpot and Picket, seem to have been concerned, in the fall of 1864, in oil operations in Pennsylvania, and on the 19th day of October,
225 of that year, Gruninger sold to Philpot and Picket, in consideration of a certain sum of money paid and to be paid thereafter, his interest and claim in a lease of lot 15, on the Smith Farm, on Cherry Run, *Chenango* County, upon which there was a flowing well of about one hundred barrels of oil, more or less, per day, his claim being one-half of the working interest or one-quarter of all the oil produced upon the lot.

And on the same day Gruninger sold to Philpot and Pickett his interest in a well in the Coombs Lease, on the Blood Farm, the claim being one-eighth of the working interest, in consideration of a certain sum of money to be paid by Philpot and Pickett on the 24th of February, 1865. Pickett wrote a letter to Gruninger in which he said he had just heard that Gruninger had returned from Massachusetts; that he had received a letter from Gruninger, which he intended to answer at once. He says, further, that he was glad to learn that Gruninger had got back among them, and hoped that he would be able to come and see them
226 before long. The letter ends with this paragraph: "I think we can fix up that Blood Farm matter satisfactorily when you come up. If we can do anything to your advantage we shall be glad to do so."

On the 21st of April, some parties, among whom were Philpot, Sherman and Company, entered into an agreement by which they were to put certain interests in lands, oil wells, etc., into a concern which was to form a joint stock company.

On the 6th of May, 1865, the date of the note given by the defendants, this memorandum, added by Gruninger to the agreement between Philpot, Sherman and Company, and the other parties, "May 6, 1865. It is agreed this day that Lawrence Gruninger is to put into the company one-half the working interest, it being one-quarter of all the oil on or to be produced on the lease of lot eleven, on Smith's Farm, on Cherry Run, on the same terms and conditions as the balance of the parties," etc. And, also, to take the same proportion or pro rata
227 of the profits in the said company at and for the sum of $30,000.

And, on the same day, Gruninger sold to Philpot, Sherman & Company one-eighth of the working interest, being one-sixteenth of all the oil produced from well number two, lot seven, of *Oil Creek*, Blood Farm. And on the same day, also, the defendants executed to Gruninger the note which is the subject of controversy in this case, by which they agreed to pay to Gruninger on demand the sum of $3,000.

This is all the documentary evidence that we have between these parties up to the time of the execution of this note, and so far as they throw light upon the consideration of this note they should have great weight, because this is certain evidence, not liable to defect of mem-

ory, misapprehension, or mistake. You can, of course, also refer to the testimony of witnesses so far as they throw light upon the consideration of the note.

Independent of this you can examine what took place and was written, subsequently, between the parties themselves. And first is the
228 letter of Gruninger to Philpot, Sherman and Company, of the 20th of May, 1865, in which he says that he was at home waiting for Prince; that he was to meet him at New York, and then both of them were to see the defendants at Philadelphia; and he uses this language, "And you must get"—the word "not," I presume, being accidentally left out—"and you must not get any document out with my name or interest mentioned in it before I see you. I have partly concluded to have nothing to do with stocking my interest."

The next in order then is the telegram of the 29th of May, addressed by Gruninger to Prince and Erwin. The language of the telegram is—"Do not take the company. You know my reason. Shall keep my interest. Have spoken to a New York company. They want to buy mine and yours. Will let your know soon as they make an offer."

Now this was carrying out the purpose which he announced on the 20th of May, when he said, "I have partly concluded to have nothing to do with stocking my interest."

229 Then come the letters of July 5th, 1865, which are so different in their character, and which it is difficult to account for upon the presumption that the respective writers understood the subject alike or had knowledge of the same facts.

The first letter was written by Pickett—although I am not aware there is anything to determine which letter was written first—and signed by Philpott, Sherman & Co.: "Mr. Madison of the bank has not yet heard of the payment of the note you gave me, payable in New York, some time last month. If you have not paid it, you must attend to it at once, as the bank *are* boring me a good deal about it." He now speaks of the subject matter of this suit. "We have learned that the note given you by our firm has been sent to Philadelphia for collection. All I can say is—he speaks in the first person—"all I can say is, we are at present unable to pay it. The change in times has so contracted our means as to make it doubtful if we are able to pay
230 your note, in cash, at all. We will be glad to settle with you by letting you have some good property any time, but money at the present time is out of the question with us." Now, it will be observed that in this letter, written by Pickett, there is no pretence set up of any want of consideration in the note; no objection whatever is made to the payment of the note except the inability to pay cash, and the necessary implication, from the language of the letter is, liability on the part of the firm to pay the note.

Then follows the letter so different in its character, also signed by Philpot, Sherman & Co., the defendants, but written by Philpot, and addressed to Gruninger: "The note given by us to you has been presented, by a collector, for payment. I think a very strange proceeding under the circumstances the note was obtained, and a part having been paid. We have your name to a contract assigning your interest in well number 11, on Smith Farm, and we would recommend that you
231 withdraw that note, and as soon as convenient, meet us in Philadelphia, when a satisfactory adjustment of the whole can be arrived at. If you push that note, we shall assuredly demand that interest which we have you bound for, and proceed accordingly; we shall leave for Titusville next Wednesday evening; we think if you will meet

us here on Wednesday next, the matter can be settled." On the 7th of July, Gruninger answered this letter, written by Philpot, although, perhaps, it purports to be in some respects an answer to both, but particularly to Philpott's. He refers to the letters written the same day. He says he can't see anything strange in the proceedings. He says that he knows—it is addressed to the defendants—that the note ought to have been paid a long time before, and informs them that they had promised that they would pay it in one month's time. He speaks of his need of money, expresses regret that they had mentioned about the contract of assignment. He says that he had given the note for collection, and that it must and shall be collected, etc. And it is very clear that
232 in many respects, Gruninger and Philpott took entirely different views of the liability of the defendants upon this note.

Now I have referred, I think, to all the written evidence there is throwing any light upon the consideration of this note. It is claimed, as I understand, on the part of the plaintiff, that the note was executed in consideration of transactions previous to the 6th of May, 1865.

It is claimed, on the other hand, by defendants, that it was executed in consideration of the agreement made by Gruninger on the 6th of May, to enter into this oil company, and to put certain interests of his into that company; and also in consideration of the transfer of the well number 2.

The main question for you to determine is what is the truth under the evidence, as to this. If, in point of fact, the note was given in consideration of past transactions of obligations already accrue' or accruing, then, of course, the defense fails.

If, on the other hand, the note was given in consideration of
233 the agreement on that day made by Gruninger, to enter into this company; and also, in consideration of the transfer of well No. 2, and he did not enter into the company but failed to comply with his agreement, and there was no value in well number 2, as stated in the plea, then the defense is made out.

But it is proper for you to consider whether or not this might have been the state of the case: that there were transactions between the parties; that there was a claim on one side, and which may have arisen, or did arise, in consequence of these transactions. Now, was there a present, existing indebtedness from Philpott and Pickett, or Philpott, Sherman & Co., to Gruninger, and was the execution of this agreement by Gruninger on the 6th of May, simply a motive for the giving of the note & not the consideration of the note. It may be that that was held out as an inducement to the defendants to give the note as a motive for putting the debt in the shape of a note rather than let it remain
234 in its then present form. If that were so, then the defense would fail, because that proceeds upon the ground, as I understand, that the actual consideration of the giving of the note, not the motive for putting the claim in that form, was the signing of this agreement of the 6th of May, and the transfer of the well No. 2.

It may well happen that A may owe a valid debt to B, and B may say to A, if you will put the debt in the shape of a note I will do some act for you; and then, when it is done, the promise to put the debt in that shape is not the consideration of the note, but the debt which is due from one to the other.

Then, if the consideration for the note was the entering of Gruninger into the contract on the 6th of May, by which he was to become interested in the company, the question is, whether Gruninger has failed, by his own act, to comply with his agreement.

There has been introduced before you a certificate from the office of the secretary of state of Pennsylvania, showing that there was
235 a company formed. Now, it is claimed on the part of the plaintiff, that the company that was referred to in the articles of agreement of the 21st of April, to which this memorandum was appended by Gruninger on the 6th of May, was a different company from that which was subsequently actually formed. Whether or not it was, is for you to say, under all the evidence in the case. Of course, Gruninger was only bound to enter into a company such as was referred to in the articles of agreement in all substantial particulars. They seek to hold him bound by his contract, and they cannot go out of the terms of the contract.

In other words, they cannot go beyond what is written in the articles of agreement of the 21st of April. And admitting that was the consideration, or part consideration, of the note, did he fail to comply; was that the company that he refused to enter into; was that the company which he referred to in his letter of the 20th of May, and in his telegram of the 29th of May, or was it another company which was
236 subsequently contemplated and arranged between the parties.

If, however, you shall believe that this was, either in whole or in part, the consideration of the note, and that he has failed to comply with his contract, then it may become a qustion to what extent there has been a failure of the consideration of the note.

Mr. GOOKINS. May I be allowed to suggest there the issue of the voluntary abandonment by Gruninger?

The COURT. If there was a voluntary abandonment of that original agreement, as it was called, of the 21st of April, with the consent of Gruninger—if that was the consideration, in whole or in part, of the note, then I think it would be unfair and unjust, and so illegal, for the plaintiff to call upon the defendants to pay, because if that was the understanding, and they have all, mutually and by common consent, abandoned it, Gruninger cannot call upon the defendants to answer for that portion of the consideration of the note.

237 Mr. HUTCHINSON. Suppose it was impossible to form a company under that agreement?

The COURT. If it was impossible to form a company under the agreement, and that was the consideration of the note, in whole or in part, then it would be unjust for Gruninger to call upon these defendants to pay. As to that, I think the consideration would have failed. Gruninger cannot claim the benefit of a contract which it was impossible for him or anybody else to perform.

This is all that it is necessary for the court to say to you about this case. It is substantially a question of fact. If you shall find that the consideration of this note was a past transaction or transactions of these parties, one or more of them, then the defendants must pay the note, with interest. If, on the other hand, the consideration was the entering into this contract by Gruninger, in whole or in part, then whether the defendants can be called upon to pay it, in whole or in part, depends upon those other considerations which I have mentioned.

238 To the following part of the charge, the counsel of the defendants then and there excepted, viz:

But it is proper for you to consider whether or not this might have been the state of the case: that there were transactions between the parties; there was a claim on one side, and which may have arisen, or

did arise, in consequence of these transactions. Now, was there a present existing indebtedness from Philpot and Picket, or Philpot, Sherman & Co., to Gruninger, and was the execution of this agreement by Gruninger on the 6th of May simply a motive for the giving of the note, & not the consideration of the note?

It may be that that was held out as an inducement to the defendants to give the note, not as the consideration for the note, as a motive for putting the debt in the shape of a note rather than let it remain in its then present form. If that were so, then the defence would fail,
239 because it proceeds, as I understand, upon the ground that the actual consideration of the giving of the note, not the motive for putting the claim in that form, was the signing of this agreement of the 6th of May, and the transfer of the well No. 2.

It may well happen that A may owe a valid debt to B, and B may say to A, "If you will put the debt in the shape of a note I will do some act for you," and then, when it is so done, the promise to put the debt in that shape is not the consideration of that note, but the debt which is due from one to the other.

THOMAS DRUMMOND. [SEAL.]

(Endorsed:) Filed Dec'b. 17th, 1869. W'm H. Bradley, cl'k.

On this day, to wit, the 28th day of December, A. D. 1869, came said defendants, and filed in said clerk's office their appeal bond in said entitled cause, which said appeal bond is in the words and figures following, to wit:

Supreme Court of the United States.

240 ALICE B. GRUNINGER, EXECUTRIX OF the estate of Lawrence Gruninger, deceased,
vs.
BRIAN PHILPOT, GEORGE J. SHERMAN, AND Henry E. Picket. } In error.

Know all men by these present that we, Brian Philpot and Henry E. Picket, defendants with George J. Sherman in the above entitled cause, and Samuel B. Gookins and Samuel J. Walker, are held and firmly bound unto the above-named Alice Gruninger, executrix of the estate of Lawrence Gruninger, deceased, in the sum of five thousand dollars to be paid to the said Alice Gruninger, her executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this twenty-seventh day of December, 1869.

241 Whereas the above-named Brian Philpot, George J. Sherman, and Henry E. Pickett, have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the northern district of Illinois:

Now, therefore, the condition of this obligation is such, that if the above-named Brian Philpot, George J. Sherman and Henry E. Picket shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be in full force and virtue.

In witness whereof we have hereunto set our hands and seals the day and year above-written.

BRIAN PHILPOT. [L. S.]
HENRY E. PICKETT. [SEAL.]
SAMUEL B. GOOKINS. [L. S.]
SAM'L J. WALKER. [SEAL.]

Approved.

THOMAS DRUMMOND.

(Endorsed:) Filed Dec'b. 28, 1869. W'm H. Bradley, cl'k.

242 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript from the record of all the proceedings had in said court in said entitled cause wherein said Alice B. Gruninger, administratrix, &c., is plaintiff, and said Brian Philpot et al. are defendants, as the same remains of record in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court at my office in the city of Chicago, in said district, this twenty-ninth day November, A. D. eighteen hundred and seventy, and of our independenee the ninty-fifth year.

[SEAL.] W'M H. BRADLEY,
Clerk.

[5-c't int. rev. stamp affixed and canceled.]

243 Circuit court of the United States, northern district of Illinois.

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between Alice B. Gruninger, executrix of Lawrence Gruninger, deceased, plaintiff, and Brian Philpot, George J. Sherman, and *Hervey* E. Pickett, defendants, a manifest error hath happened to the great damage of the said Brian Philpot, George J. Sherman, and *Hervey* E. Pickett, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy jnstice done to the parties aforesaid in this behalf: You are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning
244 the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this twentieth day of December, in the year of our Lord one thousand eight hundred and sixty-nine, and of our independence the ninety-fourth year.

[SEAL.] W'M H. BRADLEY,
Clerk.

Supreme Court of the United States, December term, 1870.

BRIAN PHILPOT, GEORGE J. SHERMAN, AND Henry E. Picket,
vs.
245 ALICE GRUNINGER, EXECUTRIX OF Lawrence Gruninger, deceased.

Error to the circuit court of the northern district of Illinois.

And now come the said plaintiffs in error, by Samuel B. Gookins, and James H. Roberts, their attorneys, and say that, in the foregoing record and judgement, manifest error hath intervened, in this, to wit, that the said circuit court erred in admitting evidence offered by the said defendant in error on the trial of said cause, when the same was objected to by the said plaintiffs in error, and should have been excluded; and in excluding evidence offered by said plaintiffs in error, when the same should have been admitted; and in instructing the jury as prayed by the said defendant in error, and in refusing to instruct the jury as prayed by the said plaintiffs in error; wherefore the said plaintiffs in error pray that the said judgement may be reversed.

S. B. GOOKINS,
JAMES H. ROBERTS,
Att'ys for Pl'ffs in Error.

246 (Indorsed:) Circuit court of the United States, northern district of Illinois. Alice Gruninger, exe'x of Lawrence Gruninger, dec'd, vs. Brian Philpot, George J. Sherman, & Henry E. Pickett. Writ of error.

(Indorsement on cover:) No. 381. Brian Philpot, George J. Sherman, and Henry E. Picket, plaintiffs in error, vs. Alice B. Gruninger, ex't'x of Lawrence Gruninger, dec'd. N. Illinois, C. C. U. S. Filed 10th December, 1870.

Supreme Court of the United States.

DECEMBER TERM, 1870.

BRIAN PHILPOT.
GEORGE J. SHERMAN AND
HENRY E. PICKET. } *Plaintiffs in Error.*

vs.

ALICE B. GRUNINGER, EXECUTRIX
OF LAWRENCE GRUNINGER, Deceased. } *Defendant in Error.*

BRIEF OF SAMUEL B. GOOKINS AND JAMES H. ROBERTS

FOR PLAINTIFFS IN ERROR.

Supreme Court of the United States.

DECEMBER TERM, 1870.

ALICE B. GRUNINGER,
EXECUTRIX OF LAWRENCE GRUNINGER, DEC'D.
vs.
BRIAN PHILPOT,
GEO. I. SHERMAN, AND
HENRY E. PICKET.

IN ERROR
to the
Circuit Court of the U. S.
for the
Northern District of
Illinois.

BRIEF FOR PLAINTIFFS IN ERROR.

This was an action of assumpsit brought by the defendant in error as executrix of her deceased husband, Lawrence Gruninger, against the plaintiffs in error, *as copartners*, in the Circuit Court of the United States for the Northern District of Illinois, on a promissory note for $3,000 made by plaintiffs by their firm name, at Philadelphia, Pa., May 6, 1865, and payable on demand to the testator, Lawrence Gruninger, or order. Plaintiffs pleaded a total and also partial failure of consideration. Philpot & Picket pleaded jointly; Sherman separately. Verdict and judgment were rendered for defendant in error, and plaintiffs prosecuted this writ.

Supreme Court of the United States.

DECEMBER TERM, 1870.

ALICE B. GRUNINGER,
EXECUTRIX OF LAWRENCE GRUNINGER, DEC'D,
vs.
BRIAN PHILPOT,
GEO. I. SHERMAN, AND
HENRY E. PICKET.

IN ERROR,
to the
Circuit Court of the U. S.
for the
Northern District of
Illinois.

BRIEF FOR PLAINTIFFS IN ERROR.

This was an action of assumpsit brought by the defendant in error as executrix of her deceased husband, Lawrence Gruninger, against the plaintiffs in error, *as copartners*, in the Circuit Court of the United States for the Northern District of Illinois, on a promissory note for $3,000 made by plaintiffs by their firm name, at Philadelphia, Pa., May 6, 1865, and payable on demand to the testator, Lawrence Gruninger, or order. Plaintiffs pleaded a total and also partial failure of consideration. Philpot & Picket pleaded jointly; Sherman separately. Verdict and judgment were rendered for defendant in error, and plaintiffs prosecuted this writ.

The facts of the case may be found succinctly stated in the charge of His Honor Judge Drummond to the jury (on p. 72), and we therefore quote therefrom as follows: "These parties, the deceased, Lawrence Gruninger, and Philpot and Picket, the defendants, and Sherman, but particularly Philpot and Picket, seem to have been concerned, in the fall of 1864, in oil operations, in Pennsylvania, and on the 19th day of October of that year, Gruninger sold to Philpot and Picket, in consideration of a certain sum of money paid, and to be paid thereafter, his interest and claim in a lease of lot 15, on the Smith farm, on Cherry Run, Chenango County, upon which there was a flowing well of about one hundred barrels of oil, more or less, per day, his claim being one-half of the working interest, or one-quarter of all the oil produced upon the lot. (R., p. 53.)

And on the same day Gruninger sold to Philpot and Picket his interest in a well in the Coombs lease, on the Blood Farm, the claim being one-eighth of the working interest, in consideration of a certain sum of money to be paid by Philpot and Picket. (R., p. 51.) On the 24th of February, 1865, Picket wrote a letter to Gruninger, in which he said he had just heard that Gruninger had returned from Massachusetts; that he had received a letter from Gruninger, which he intended to answer at once. He says further that he was glad to learn that Gruninger had got back among them, and hoped that he would be able to come and see them before long. The letter ends with this paragraph: "I think we can fix up that Blood Farm matter satisfactorily when you come up. If we can do anything to your advantage we shall be glad to do so." (R., p. 71.)

On the 21st of April, some parties, among whom were

Philpot, Sherman and Company, entered into an agreement by which they were to put certain interests in lands, oil wells, &c., into a concern which was to form a joint stock company. (R., p. 44.)

On the 6th of May, 1865, the date of the note given by the defendants, this memorandum was added by Gruninger to the agreement between Philpot, Sherman and Company, and the other parties: "May 6, 1865. It is agreed this day that Lawrence Gruninger is to put into the company one-half the working interest, it being one-quarter of all the oil on or to be produced on the lease of lot eleven, on Smith's Farm, on Cherry Run, on the same terms and conditions as the balance of the parties," etc. And also, to take the same proportion or pro rata of the profits in said company, at and for the sum of $30,000. (R., p. 46.) And, on the same day, Gruninger sold to Philpot, Sherman and Company, one-eighth of the working interest, being one-sixteenth of all the oil produced from Well number two, lot seven, of Oil Creek, Blood Farm. And, on the same day, also, the defendants executed to Gruninger the note which is the subject of controversy in this case, by which they agreed to pay to Gruninger on demand the sum of $3,000.

This is all the documentary evidence that we have between these parties up to the time of the execution of this note."

It will be observed that the note sued on bears even date with the agreement (p. 44) of Gruninger, Philpot, Sherman & Co., and others, to form the joint stock company, and put into it lands and oil wells, and it bears even date with the assignment and transfer by Gruninger to Philpot, Sherman & Co., of the well No. 2, Blood Farm, Coombs lease (p. 50.)

The claim of plaintiffs in error is that the note was given by them to Gruninger in consideration of the agreement of Gruninger that he would become a member of this proposed oil company, and put certain property in it, and also in consideration of the transfer to them of the Coombs lease, Blood Farm, Well No. 2, and that he had failed and refused to perform his agreement.

Defendant in error claimed that it was given in consideration of the said transactions of October 19th, 1864, in settlement of an existing indebtedness.

Plaintiffs in error insist that the manifest preponderance of the evidence shows that Sherman was no party to the said transactions between Gruninger and Philpot & Picket, on the 19th of October, 1864. That if there was any indebtedness growing out of those transactions, it was from Philpot & Picket, and not from Philpot, Sherman & Co. That the agreement itself (R. p. 51) was executed by Philpot & Picket only, that they only bought the well and they only agreed to pay for it, that said agreement amounted to an assignment and transfer by Gruninger to them of his leasehold interest in said well for the consideration of $3,500, to be paid within thirty days thereafter. The only witness whose testimony tends to show that Sherman had an interest in that purchase or lease is D. W. Prince, who says, (p. 54, Int. 6.,) that he knew they were *then partners*, but on cross-examination to this point he shows his ignorance of the fact (p. 59, Cr. Int. 2), and all the proof beside shows he was mistaken on that point. Now when Gruninger and Philpot & Sherman meet on the 6th of May, 1865, at Philadelphia, they discuss this matter of the claim

of Gruninger for $3,500, for this well No. 2, long over due and unpaid. And the witnesses there present, Bradly and Barnes, swear unequivocally that the note and agreement were executed at the same time, and that while Gruninger claimed pay for the well, it was refused on the ground that it proved worthless, and the note in suit was then given in consideration that Gruninger would become a member and put his property into the new company, and transfer the well No. 2 to Philpot, Sherman & Co. The note and agreement of Gruninger to enter the new company bear date May 6th, 1865, and the conveyance of the well No. 2, Blood Farm, from Gruninger to Philpot, Sherman & Co. bears same date and recites the consideration of $3,000—not $3,500—the price at which it had been sold to Philpot & Picket.

Having thus stated the facts in a general way, we are prepared to call attention to the alleged errors in the charge of the court, and that portion excepted to will be found on page 75, at the bottom. We insist respectfully that the jury were misled in view of the evidence in this case, first, by the distinction there made by the court between the *motive* or *inducement* for giving the note, and the *consideration* of the note; and secondly, if the distinction were sound, the court misled the jury in applying it to the contingency of a present existing indebtedness from Philpot and Picket *or* Philpot, Sherman and Co., whereas it should have been confined to a present existing indebtedness from Philpot, Sherman and Co.

We will discuss the latter proposition first. We assume for the purpose of the argument at this point, that in view of the evidence the jury might have found, that at the time this note

was made Philpot and Picket only (if anybody) were indebted to Gruninger, and we will hereafter examine the testimony at large to show that from its manifest preponderance the jury must have so found.

Assuming therefore that the jury might have fairly found that there was an indebtedness of $3,500 from Philpot and Picket only for this well, purchased by them from Gruninger on the 19th of October, 1864.

The court says, "Was the execution of this agreement by Gruninger, on the 6th of May, simply a *motive* for the giving of the note and not the *consideration* of the note. It may be that that was held out as an *inducement* to the defendants to give the note, not as the consideration for the note *as a motive for putting the debt in the shape of a note rather than let it remain in its then present form.* If that were so, then the defence would fail," &c.

Now as to Sherman, who did not owe the debt, what possible *motive* could he have for becoming liable to Gruninger for this debt. What motive or inducement could *he* have for putting Philpot and Picket's debt *in the shape* of a note on which he was to become bound? Why, "the execution of this agreement by Gruninger," the Court says. Then, if without that agreement *he* would not have been induced to put the debt in that shape—would not have become a co-promissor with Philpot and Picket for their debt—we think it logically follows that such agreement was, *as to him*, the consideration of the note. It may well be that where A. is indebted to B. on book account or otherwise, and C. joins A. in a note payable at a future day for this debt, that A.'s indebtedness is a good consideration to support an action on the note against A. and

C., and that the giving of time to A. was the motive which induced C. to become bound with A., and that in such case the consideration of the note as to A. is the existing indebtedness of A. to B. But as to C., the consideration in part for his promise is also the inconvenience to B., and the benefit to A. of the *time* given for payment, and it is quite clear that until the expiration of the *time*, B. could not sue A. on the original consideration. But here Sherman agrees to execute to Gruninger the note of his firm, upon what consideration? Why, that Gruninger would enter into this agreement to become a member of the proposed company, and put $30,000 of valuable property into it. This is the only motive or inducement as to him. No time is given. The note is a demand note. The giving of the note is neither a damage to Gruninger nor a benefit to Philpot and Picket, and Gruninger could at once, upon its execution, demand payment, and sue the makers for failure, or instantly sue without demand. We therefore say as to Sherman, especially, this distinction between the motive or inducement and the consideration, if well founded in any case, was inapplicable to the facts in evidence, and was, therefore, well calculated to, and in fact did, mislead the jury; for the proof was quite clear that Philpot and Picket bought the well No. 2 of Gruninger on the 19th of October, 1864, and agreed to pay him therefor $3,500 within thirty days. The proof was conflicting as to whether the well was then worthless, and Gruninger's representations about it false. Coombs swore that he had charge of the well, and that it was utterly worthless. Cushman swore that it was worth all Philpot and Picket agreed to pay for it. Bradley says that on the 6th day of May, 1865, when the agreement and note were mutually made, it was then

claimed by Philpot, Sherman and Co. that the well was bought on Gruninger's representations, which proved false, and Gruninger claimed the contrary, and wanted his pay for it. Thereupon Philpot and Sherman (Picket being absent) say, Now Mr. Gruninger, you want your pay of $3,500 for this well. If you will execute this agreement and put $30,000 of oil property into this proposed company, you shall have the demand note of Philpot, Sherman and Co. for $3,000 in settlement of your claim for this well No. 2 sold Philpot and Picket. It is undisputed that the property proposed by Gruninger to be put into the new company was very valuable, and that it was very desirable in a pecuniary point of view to Philpot, Sherman & Co. to get that property into the new company, and the promise or agreement of Gruninger to go into that company was the *motive* that operated on the mind of Sherman to consent to give the note. We say that under the evidence the jury in this conflict might have found that Philpot and Picket only owed the debt of $3,500 to Gruninger, and that Sherman's only motive or inducement for giving the note was this agreement of Gruninger to enter the new company, and under such state of facts we think, as to him, this original indebtedness of Philpot and Picket could in no fair sense be called the consideration of the note, and Gruninger's promise to enter the new company the motive or inducement for giving it. And yet the jury are told that although they might find Gruninger had failed and refused to perform his agreement to enter the new company, and put in his valuable property, yet if they further found *an existing indebtedness from Philpot and Picket*, and that this agreement of Gruninger was held out as an inducement to defendants to give the note as *a motive for putting the debt in the shape of a note*,

rather than let it remain in its then present form, then the defense would fail, for the agreement was no part of the consideration of the note, the existing indebtedness from Philpot and Picket was the consideration.

But we now proceed to discuss the first proposition, that the distinction made by the court, in view of the evidence in this case, between the *consideration* of the note and the *motive* or *inducement* operating to cause defendants to give it, misled the jury.

I again here assume what I will hereafter show, that there was controversy between Gruninger and defendants just previous to and at the time this note was given, as to the sale of the well No. 2, Coombs' lease, Blood Farm, made the previous October; Gruninger insisting that he must be paid for it, and defendants that it had been bought on his representations of its value, and that these had proved false, and that the well was, when bought, worthless. And for the sake of the argument I will concede that the evidence is insufficient to show that it was worthless or bought on Gruninger's representations, and that the claim of defendants at that interview with Gruninger on the 6th of May, 1865, that the well proved worthless, was not well founded, and that on the whole defendants were lawfully indebted to Gruninger $3,500 for it, but in good faith thought otherwise, and refused payment or would only consent to pay or execute the note in question, provided Gruninger would agree to go into, and put his property into the proposed new company.

Now the court says to the jury, "It may well happen that A may owe a valid debt to B, and B may say to A, 'if you will put

the debt in the shape of a note I will do some act for you,' and then when it is so done the promise to put the debt *in that shape* is not the consideration of that note, but the debt which is due from one to the other." This was put by way of illustration, to show the distinction between the consideration and the motive or inducement. If this distinction is known to the books, it can only apply to such a case as this put by the court, where A owes a valid debt to B and does not dispute it, but we respectfully insist that it could never apply to a case where although A owed a valid debt to B, he believed otherwise and denied it, and B in order to induce A to give him an acknowledgment of it in the shape of a promissory note, promises on his part to do some other thing. In such case, while the valid debt may be in part the consideration of the note, it is not the whole consideration, and to allow B to repudiate his promise and sue and recover *on that note* would be to encourage fraud. It is true he might sue on the original indebtedness, after the note was over due, and recover if he could prove it, but in case he sued on the note and defendant pleaded a failure of consideration in whole or in part, would he be allowed to say that the original indebtedness was the only consideration of the note, and his promise to do some other thing was only the *motive* that moved defendant to give the note, which could not be set up in defence to an action on the note, but defendant must be remitted to his cross action for breach of this promise. Surely it is the policy of the law to avoid circuity of action, and everywhere now these pleas of total or partial failure of consideration are encouraged, simply to avoid a multiplicity of suits.

But the illustration by the court above quoted, is itself con-

fused and obscure, tending, as we respectfully urge, to make the distinction which it was employed to illustrate, more difficult of comprehension by the jury.

It is obvious, however, in taking the whole charge together, that the jury well understood that if they found defendants or Philpot and Picket owed Gruninger a valid debt for this well No. 2, and that they were induced to give him this note for the debt, by reason of Gruninger's promise to go into the new company, and put in his property, Gruninger's failure to do so would be no defence under the issues, because that promise of Gruninger's was not the consideration of the note, but the valid debt was the consideration, and the defence was simply a failure or partial failure of consideration.

Plaintiffs in error relied on this arrangement made on the 6th of May, as a compromise binding on all, and directed their evidence mainly to establish that the note sued on was the result of that compromise, and as no notice or account of any other claim than the note was filed under the common counts, and no proof made under them, they did not go fully into the original transaction.

We do not think that we could present our views more clearly by further amplifying. We now proceed to examine the facts somewhat at large, that the court may see the drift of the evidence, and how the charge to the jury must have misled them, and also call attention to certain other errors and exceptions.

And we remark here, that but two witnesses, Albert Erwin for defendant, and M. S. Thompson for plaintiffs, were sworn and examined at the trial. Their testimony will be found at pages 70 and 52. They neither knew nor pretended to know anything of the consideration of this note. All the other

testimony was taken by depositions, so that this court is as competent in every respect to examine and pass upon the merits of this cause as the jury and court below.

THE EVIDENCE.

Our first proposition is that the consideration, motive or inducement, whatever it may be called, that moved defendants to give the note in suit on the 6th of May, 1865, was the agreement of Gruninger to become a member of, and put certain valuable property into a joint stock company with plaintiffs in error and others, and to transfer to plaintiffs his lease of Well No. 2, Blood Farm; that he refused and neglected to comply with the agreement as to the joint stock company, and secondly, had no title to the lease of Well No. 2, and that it was then worthless.

Now to the testimony on this proposition. It is not disputed that the agreement of Gruninger, by which he became a party to the existing agreement between Prince and Irwin, E. C. Bradley and Bro., and Philpot, Sherman and Co., was executed by him at the office of Philpot, Sherman and Co., at Philadelphia, May 6th, 1865. (See it, pp. 44 to 46.) That the note was made at the same time and place. That there were present, D. W. Prince and Justin B. Bradley, the plaintiffs, Bryan Philpot and George I. Sherman, and George T. Barnes, Sterling Bonsal, and said Gruninger. The plaintiff, Picket, was not present, nor the witness, Albert Erwin, nor the other party to the agreement, E. C. Bradley, but the last two, as well as Picket, were represented by their respective partners. Bonsal was the attorney who drafted the papers for the formation of the proposed company mentioned in the articles of agreement. He was present after the execution of

the agreement, and does not testify to any conversation in his hearing about the note.

But J. B. Bradley and Geo. T. Barnes do testify directly and pointedly as to the execution and delivery of the note, and the conversation which occurred between Gruninger and plaintiffs, Philpot and Sherman, at the time it was made. The witness Prince professes to know nothing about it except what he heard plaintiff, Picket, who was not present, say at a subsequent time in Titusville. We will hereafter carefully note the testimony of this witness. But first in order is the witness,

Justin B. Bradley. On p. 29, int. 21, he says he was present at Philpot and Sherman's office, Philadelphia, on 6th May, 1865. Int. 22.—States that Prince and Erwin, Philpot and Sherman, Gruninger and Barnes, were present. (He was mistaken as to the presence of Erwin, who says—p. 70—he was not then in Philadelphia.) Int. 25.—He says that there was a good deal of talk (at the time Gruninger came there) backwards and forwards, about going into this Company, and he (Gruninger) said that there had been an old trade of some kind or other that he wanted pay for. Mr. Philpot and Sherman finally agreed that if he would put his property in, as the talk was, they would pay him $3,000, or give him a note for $3,000, to settle up some old matters. It was some well. Int. 28.—That he got the impression (whether it was from what was said there or not) that the well Gruninger was claiming pay for was not good for anything some way.

Int. 30, 31.—That after the conversation Gruninger signed the agreement, and Philpot, Sherman and Co. gave him the note for $3,000.

And on cross-examination by counsel for defendant in

error, he says (p. 33, ints. 84 to 87). Gruninger insisted that the old contract should be settled before signing the agreement. * * "They finally agreed that if he would put his property in they would give him $3,000, or a note for it, payable at the end of a few days." "That was for the old interest *provided he would go into the new arrangement.*" "They made one trade of it, as I understood it. They gave this note for the sake of having him go in with them into the company. They considered it was not worth anything. They bought the well on representations, as I understood it, by their talk backwards and forwards. They found out that the well was not good for anything, nor never had been." Q. "That is what they represented?" A. "Yes, sir." That the execution of the note and agreement was done at one sitting.

P. 31, int. 46. That Gruninger did not become a party to the Company, though why he did not know.

On re-direct examination he says (pp. 35 and 36, ints. 117 and 118): Philpot, Sherman and Company would not settle for this old well unless Gruninger would put his property in this new company.

Our next witness is

George T. Barnes.—He says, (p. 38, Int. 6,) that "the note was made at the office of Philpot, Sherman & Co., at about May 6th, 1865, I am not sure of the day. It was given on the supposition by Philpot and Sherman, that Mr. Gruninger was to go into the Philpot and Sherman Petroleum Company. They were to give this note for certain oil interests, *if* Mr. Gruninger should put certain oil interests into the Philpot and Sherman Petroleum Company, in accordance with the agreement of May 6th, 1865. The formation of the company was the principal thing for which they met, in fact, as

far as I know, it was the only thing. I think the giving of the note was part and parcel of the same transaction, and the formation of the company was the principal thing that Philpot, Sherman and Company were working for, and the acquiring of the interest from Gruninger, for which the note was given, was simply an addition to the transaction. I feel sure that the whole transaction was in reference, principally, to the formation of the company, and it was considered important to get Mr. Gruninger and his interest into the company, as the other parties hesitated to go on without him."

On p. 39 he says: A company was organized, (see its charter p. 49,) and that Gruninger did not become a member of it.

The next witness is *Sterling Bonsal*, the attorney. Page 41, in answer to Int. 5, he says he went to the office of Philpot, Sherman and Co., in Philadelphia, and there met Gruninger and these other parties, and the agreement was read over, and he was then directed to prepare the necessary papers for the formation of the new company. The parties were to place in his hands the evidences of their ownership of the interests to be contributed by them towards the company. Gruninger took his name and the address of his firm for the purpose of communicating with him; that Gruninger did not enter the company.

Int. 9.—Gruninger left the city, and sent a telegram to Prince & Erwin on the 29th of May, saying, "do not take the company; you know my reason; shall keep my interest," &c.

This witness knows nothing and heard nothing about the consideration of the note. The only other person present beside these witnesses, Bradley and Barnes, who testifies, is *Prince*. He was sworn by plaintiff, and his deposition will be found on p. 53. In answer to the eighth direct Int., p. 55, in

which he is asked to state *where* and the time when the note in suit was given, says, "I don't know where or when the note was given," and in answer to the fourth cross Int., p. 60, he says, "I do not know whether the said contract of Gruninger is of the same date as the note: I don't whether they were made at the same time or not; I don't know anything about the reason of their being of the same date; I can't tell how they came to be made at the same time." And yet he carefully withholds mention of the fact that he was present at the office of Philpot, Sherman and Co., when this note and agreement were made, as Bradley and Barnes state; and in answer to direct Int. eighth, he seeks to drag in a conversation had with Picket, at Titusville, some time after, in which he says, that Picket remarked, that *he, Picket*, thoughtlessly gave the note in settlement for the Coombs interest; that they meant to pay for the interest when they could as well as not.

This witness well knew that Picket was not present in Philadelphia when the note was given, and could know nothing about it save what he subsequently learned, nor upon what conditions his partners executed it. It is a significant fact that the deed from Gruninger to Philpot, Sherman and Co. for this Coombs interest, or Well No. 2, was made on the 6th of May, 1865, and their witness, Erwin, says it is in *Prince's handwriting* (p. 70), and it was also witnessed by this man Prince (p. 50), and no doubt was made at the same time and place the note was. The animus of this witness is disclosed by himself. He ascertained that Philpot and Picket paid Gruninger and Thompson $64,000 for their half of Well No. 15, and only paid him $60,000 for the other half, although they told him they would not pay Gruninger more than they did him. He also colluded with Gruninger to enable the

latter to obtain this note, for he was a party to the agreement, and the telegram from Gruninger to Prince and Erwin, above referred to, further says: "Have spoke to a New York Company. They want to buy mine and yours. Will let you know as soon as they make an offer," (p. 42, int. 9, of Bonsal's dep.,) and Bonsal says, on reading the dispatch, Prince and Erwin handed it to him, and said that it referred to the Company mentioned in the agreement (p. 42, at bottom). Yet Prince pretends that it did not, but referred to the company then actually formed (p. 57, int. 13), and Prince says that the company contemplated by the agreement could not be formed under the laws of Pennsylvania. Here, then, we have the uncontradicted testimony of two witnesses who were present at the time of the execution and delivery of the note, and we will now examine the evidence contravening it. First is that of the witness Prince as to the statements of *Picket*, who was not present, and next is the correspondence between Gruninger and the defendants on the subject. And first we have the letter written by plaintiff, Picket, to Gruninger, Feb. 24th, 1865, already quoted (p. 71). Next is the letter of Gruninger to Philpot, Sherman & Co., May 20th, 1865 (p. 36). In this he says nothing of the note, but instructs them not to proceed further in the business until he sees them, as he has "partly concluded to have nothing to do with *stocking* his interest." This is followed by Gruninger's telegram to Prince and Erwin of May 29th (p. 42, at bottom), saying, among other things, "do not take the Company; you know my reason." And we may say here, as well as elsewhere, that Prince swears (p. 62, cross-int. 7) he supposes the reasons were "that Gruninger would have nothing more to do with Philpot, Sherman and Co. because he alleged that

they had not done as they had agreed with him." The next are the two letters from Philpot, Sherman and Co. to Gruninger, both dated July 5th, 1865—one written from Titusville by Picket (p. 24), and the other from Philadelphia by Philpot (p. 25); that of Picket expressing a willingness to pay in property, complaining that defendants are unable to pay in money; that of Philpot saying that the note had been presented by a Collector for payment, "a very strange proceeding under the circumstances the note was obtained;" that if Gruninger pushed the note, defendants would enforce the agreement. Gruninger replies July 7th (p. 25), and acknowledges receipt of these letters, and insists on payment of the note. It will be perceived that the letter written by Philpot consists with the defence here set up, while that of Picket may be regarded as an acknowledgment of the debt. But the explanation is easy. Picket was not acquainted with the circumstances under which the note was given, being at the time at Titusville, managing the business of the firm there, while Philpot made the note at Philadelphia, and was, of course, acquainted with the circumstances and condition on which it was given. It will be remarked, too, that Gruninger does not, in his letter, pretend that he had been ready to go into this company and put his property in according to agreement, or that the company could not be formed; for, as Prince says, he had determined to have nothing more to do with Philpot, Sherman and Co., alleging that they had not done as they agreed with him; that is, they had refused to pay him for this worthless well, and although he had procured their note under the agreement to go into the new company, yet he had resolved from the time of making that agreement to break it, and try to collect this note upon the pretense that it was given in consideration

of this Well No. 2. We do not see any irreconcilable conflict between this correspondence and the testimony of Bradley and Barnes touching the consideration of this note. Gruninger does not pretend that the note and agreement were not part and parcel of the same transaction. His letter is defiant, but it is cautiously non-committal.

We say further that the true consideration of this note was not only the agreement of Gruninger to go into the company, but the transfer of this lease of Well No. 2, and this will appear further by the attempt of Gruninger to make conveyance of this latter well to Philpot, Sherman and Co., by deed of May 6th (p. 50). Why, if the view of the other side is correct, did he not stand on his previous conveyance of this lease to Philpot and Picket (p. 51)? He well knew they repudiated the original sale and transfer as procured by false representations, and had never taken possession of the well, as Coombs testifies, and that the matter had remained in *statu quo* from October 19th to May 6th. And we insist that he must take one position or the other, for if the first conveyance or assignment of the lease to Philpot and Picket was valid, then the second was not, and he could convey nothing by the latter to Philpot, Sherman and Co., the title having already vested by the former assignment in Philpot and Picket. Philpot, Sherman and Co. were entitled to a valid assignment of this lease, and if that was a part of the consideration of the note, as we insist, they did not get it unless the first one was invalid.

Washington v. *Ogden*, 1 Black, U. S. Sup. Ct. R., p. 450.

That this Well No. 2 was, at the time it was sold to Philpot and Picket, on the 19th of October, worthless, is proved by

Coombs (p. 46), who was a part owner. Int. 7.—"It never was a paying well." He says he was engaged in running it (int. 3), and that on the 6th of May, 1865, or at the time Gruninger told him he had sold his interest to Philpot, Sherman and Co., Gruninger's interest was encumbered about $200 for oil taken away and operating expenses (int. 8). If, then, the consideration of the note was Gruninger's agreement to go into a company thereafter to be formed, and also to sell and assign his interest in the lease of Well No. 2, and he either refused to go into the company, or the company could not be formed under the law, there would be a partial failure of consideration, and if the Well No. 2 was worthless, or he had previously assigned his interest to Philpot and Picket, the consideration wholly failed.

We now proceed to inquire,

Were Philpot, Sherman and Co. indebted to Gruninger under the contract of Oct. 19th, 1864, for the sale of Well No. 2, Blood Farm?

It is conceded that the partnership of Philpot, Sherman and Co. consisted of Philpot, Sherman and Picket, and defendant in error seeks to prove the liability of Philpot, Sherman and Co. to pay this note, because they, as a firm, were purchasers of this Well No. 2, in October, 1864, and settled their indebtedness by giving the note on the 6th of May following. The proof adduced is, of course, *Prince's* say so, and he deposes (p. 54, int. 6) that they were partners at that time; yet he admits everywhere that the negotiations for the sale of his interest in the Well 15 were with Philpot and Picket only. Sherman is nowhere mentioned by anyone as participating in the negotiations for the purchase of any of this oil property previous to Nov. 8th, when, as we say, the

partnership was formed. On the cross-examination (p. 59, int. 2), when interrogated specially as to his *knowledge* about the copartnership, and the execution of the contracts of Oct. 19th by Philpot and Picket and Gruninger, and not by Sherman, he confesses his ignorance by saying that all he knew about the contracts was contained in his answers to direct ints. 4th and 5th, and the fact that he was afterwards present when Gruninger executed a title to Well 15 to *Philpot, Sherman and Co.*, and delivered it to Picket. But this is not a fact, for the conveyance was not to Philpot, Sherman and Co., but to Philpot and Picket. It is in evidence at p. 53.

Their witness Cushman says, (p. 64, Int. 4,) "well No. 15 and well No. 2 were sold to Philpot, Picket and Co., as I always understood," but it appears by his deposition that he only saw Philpot and Picket and knew them in the transaction, and (Int. 7) speaks of *them* as thedefendants. He is not asked about Sherman or the partnership. The only other witness for defendant in error is Erwin, (p. 70,) he says, I don't know whether or not defendants were partners. I *supposed* they were partners when we sold our interest in well 15, in the Fall of 1864, and on cross examination he says, it may be that the partnership of Philpot, Sherman and Co. did not commence until November 8th, 1864. *I have no knowledge* when the partnership was formed. *Philpot and Picket* paid us $60,000 for one-half of well No. 15.

This was all the evidence to prove the partnership, and that Sherman was a party to the purchase of this well No. 2.

Plaintiffs in error produced the contract of purchase and sale, (p. 51,) showing the sale to Philpot and Picket.

Bradley, who owned with Prince and Erwin one-half of well No. 15, says in answer to Int. 39, (p. 30,) that his impression

is the partnership of Philpot, Sherman and Co., was not then formed, (October 19th,) and that he derived that impression from the fact that they had transacted business there with Sherman, and also with Picket, (Int. 40,) and that he supposed Picket was operating for himself in oil wells until after that time.

The witness *Thompson*, who owned with Gruninger one-half of this well No. 15, says, (p. 52,) Gruninger and I sold one-half of said well to the defendant Picket for $64,000. At that time I knew nothing of such a *firm as Philpot, Sherman and Co.* The firm of Philpot, Sherman and Co. was not contained in any of these contracts, nor was Sherman's name or that of the firm at any time mentioned during the negotiations for the purchase of these several wells, in October, 1864. Plaintiffs in error also offered in evidence, first proving the signatures of the parties, the articles of co-partnership, between Philpot, Sherman and Picket, dated Nov. 8th, 1864, (p. 51,) but the court excluded them to which we excepted. We think it was proper that these should have gone to the jury, it was for them to determine under all these facts whether they were the original articles entered into by the parties at the date thereof, or got up for the occasion. They could determine from the appearance of the paper, its color and age, and that of the ink, the difference in the writing of the signatures of the parties, and the witness to the articles, whether they were authentic and under proper instructions in the premises, these should have gone to the jury. They would have fixed, beyond question, the date of the partnership, as subsequent to the purchase of these wells.

We have thus gone into an examination of the evidence, not for the purpose of showing that the weight of evidence was with

the plaintiffs in error, (we will consider that hereafter,) but simply that this court might see that there was *conflict* in the evidence, and especially on the point as to whether there was, on the 6th of May, 1865, any existing indebtedness from Philpot, Sherman and Co., to the deceased Lawrence Gruninger, and that at all events, at the time the note in suit was given by Philpot, Sherman and Co., they denied that there was such indebtedness, and that the note was given as the result of *a compromise*, and that the portion of the charge of the court to which we excepted, was likely to. and probably did, mislead the jury.

But it will be insisted on the other side, that the court in other portions of the charge, distinctly informed the jury that if they found that the consideration of the note was the agreement of Gruninger to enter into and put his property in the new company, and also to sell and convey the well No. 2, Coombs lease, Blood Farm, and that this well proved worthless, then the defence to the note was complete. While we concede this, yet it is quite clear that this portion of the charge is not inconsistent with the fact, that the jury may have found that Philpot and Picket justly owed Gruninger for this well No. 2, although they honestly thought and claimed otherwise, and that this indebtedness of Philpot and Picket was the real consideration of the note, although the motive or inducement which led Philpot, Sherman and Co. to give the note, was Gruninger's promise to enter the new company. The fact is that the jury were misled as to what constituted the consideration of the note, and considered that if they should, on the whole, find an existingn idebtedness from Philpot and Picket, or Philpot, Sherman and Co., that was the true consideration, and they might well have found, under these peculiar issues, of total and partial failure of consideration, that plaintiffs in

error had no defence to the action on the note, while they might have a good cause of action against Gruninger on his failure to go into the proposed new company, and that there could be no failure in the consideration of the note, if, in fact, either Philpot and Picket, or Philpot, Sherman and Co., justly owed Gruninger for that well No. 2. There is the point where we were impaled by this erroneous charge of the court, for the proof adduced by plaintiffs in error, clearly showed that at the time they gave this note, the well No. 2 was regarded by them as utterly worthless, and the motive or inducement for agreeing to pay anything for it, was Gruninger's agreement to go into the new company and put his valuable property into it, that the company might at once commence paying expenses out of wells that were yielding, it being conceded that all the other property beside Gruninger's was unproductive.

It will be seen, too, on carefully examining the evidence, that there was no conversation between Gruninger and Philpot and Sherman, or either of them, to which this excepted portion of the charge could apply. Gruninger was not urging or requesting them to put the debt in the *shape* of a note, to change its *form*, or to give him any other acknowledgment of it than he already had. He was demanding his *pay* for it, as Bradley testifies, and they were refusing payment, for the reasons already mentioned, and their motive or inducement to agree to pay in any event was Gruninger's agreement to go into the new company.

The Court erred in overruling the motion for a new trial. (P. 23.)

Under this proposition we will endeavor to show that the verdict of the jury was so *manifestly* against the weight of the evidence that a new trial should have been allowed.

The evidence of plaintiffs in error is mainly adduced to establish

1st. That this Well No. 2 was sold and conveyed Oct. 19th, 1864, to Philpot and Picket, for $3,500, upon the representations of Gruninger as to its value; that the well was, when so sold and conveyed, worthless, and the representations false.

2d. That the parties met at the office of Philpot, Sherman and Co. in Philadelphia, on the 6th of May following, and then and there effected *a compromise and settlement of this claim*, by which it was agreed that in consideration that Philpot, Sherman and Co. would give to Gruninger the note in suit he (Gruninger) would become a member of, and put certain oil property, valued at $30,000, into a joint stock company about to be formed by defendants in error, Bradley and Bro., and Prince and Erwin, and sell and convey to defendants in error this Well No. 2.

The evidence of defendant in error is mainly adduced to establish, 1st, that plaintiffs in error were indebted to defendant in error for the Well No. 2, Coombs lease, Blood Farm, sold Oct. 19th, 1864, and 2d, that the note in suit was given in consideration of that indebtedness.

As we have before observed, the burden of proof was upon plaintiffs in error under the issues, and accordingly they introduced and read the depositions of Bradley, Barnes, Bonsal and Coombs, and introduced Thompson on the stand; also, the documentary evidence, consisting of the deeds from Gruninger to Philpot and Picket, conveying the wells Nos. 2 and 15 (Oct. 19th, 1864); articles of agreement forming new company, April 21st, 1865, to which Gruninger became a party May 6th, 1865; deed of Gruninger to Philpot, Sherman and Co., May 6th, 1865; assigning lease of Well No. 2; arti-

cles of copartnership of Philpot, Sherman and Co., Nov. 8th, 1864, excluded by the Court; letters of Gruninger to Philpot, Sherman and Co., May 20th and July 7th, 1865, and Philpot, Sherman and Co.'s letter to Gruninger, July 5th, 1865, written by Philpot: also, charter.

Defendant in error introduced the depositions of Prince and Cushman, and swore Erwin at the trial; also, the letters of Philpot, Sherman and Co. of Feb. 24th and July 5th, the latter written by Picket, and application of plaintiffs in error *et al.* for a charter.

We have sufficiently commented on the testimony of the witnesses, and shall not go into it again in discussing this point further than to say that we can admit as true all the evidence introduced by the defendant in error, and still insist that plaintiffs made out a complete defence under the issues, for the burden of defendant's case was that the plaintiffs owed this debt for the Well No. 2 since Oct. 19th, 1864; that the well was worth all they agreed to give for it: that Picket had acknowledged to Prince in the fall of that year that they had to buy that well in order to get the larger one (well 15)—conceded. Yet the witnesses, Bradley and Barnes, testify that on May 6th following, when Gruninger and defendants, Philpot and Sherman, met at Philadelphia, they had controversy about it, and that a compromise was effected, and the note in suit given upon certain *conditions*, among others that Gruninger should become a member of a joint stock company thereafter to be formed, and put certain property in it, and they are corroborated by the fact that the note is for $3,000. The original indebtedness was for $3,500. (P. 51.)

What is the evidence apparently countervailing this? Why Prince swears that Picket told him subsequently that *he*

(*Picket*) thoughtlessly gave the note in *settlement* of this Coombs interest, &c., in Well No. 2, (p. 55, int. 8,) and the letter of Picket of July 5th (p. 24). We insist that they are not inconsistent with the testimony of Bradley and Barnes; but if they are, it must be remembered that Picket was not present or in Philadelphia when the note was given, and Prince evidently misunderstood Picket on that point, and Philpot's letter, written same date with Picket's (p. 25), fully corroborates Bradley and Barnes, and explains Picket's.

The remainder of the evidence of defendant in error was to the effect that Gruninger was ready to go into the Company, but that under the laws of Pennsylvania it could not be formed. Conceded for the sake of the argument, but as the Court below told the jury, that was no answer to our plea.

As before observed, the testimony of Erwin for defendant in error (p. 70), and that of Thompson for plaintiffs in error (p. 52), had no bearing on the transactions of May 6th, and these were the only witnesses on the stand. This Court can, then, examine and judge for itself whether the verdict was not manifestly against the weight of evidence, as we respectfully insist it was.

This being a joint action, the recovery must be against all or none, and if this verdict and judgment ought not to stand against Sherman, it must be reversed as to all, as any defence available for him is equally so for the others, and while the defendant in error might possibly require Philpot and Picket to respond on their contract under seal (p. 51) for the purchase of Well No. 2, no recovery could be had on the common counts against defendants for the value of that well, as the law will not imply a promise where one is expressed, as in this writing. It is, therefore, clear that any recovery against

Sherman in this suit must be on the note, and not under the common counts. The pleadings distinctly admit that the note is the only cause of action.

The Court also erred in refusing to allow the plaintiffs in error to open and close the case to the jury. (P. 22.)

The rule is that the party on whom the burden of proof lies under the issues has the right to open and close.

In this case the pleas of the general issue and all others, except those of total and partial failure of consideration, were withdrawn (p. 21), and these set forth that the note sued on was the only cause of action, and this was not denied by the replications, so that the issues were narrowed to the allegation of total and partial failure of consideration, which was denied by defendant in error.

In such case, overruling the motion of plaintiffs for leave to open and close the case to the jury is the denial of a substantial right, and is error, for which the appellate court ought to reverse the cause and remand it for a new trial.

Harvey v. *Ellithorpe*, 26 Ill., 418.
1 Greenleaf's Ev., sections 74, 75, 76, and notes.

"The party who asserts the affirmative of the issue is entitled to begin and to reply." The true test is, "Which party would be entitled to the verdict if no evidence were offered on either side?"

We find in looking into the 21st rule of this court that we have not strictly complied therewith, in the former part of this brief, as to setting out *totidem verbis* the portion of the charge of the court, upon which we assign error, and, therefore, in recapitulating here the errors assigned, we shall quote it.

ALLEGED ERRORS.

1. The court erred in charging the jury, as follows: (R., p. 74.) "But it is proper for you to consider whether or not this might have been the state of the case; that there were transactions between the parties: that there was a claim on one side, and which may have arisen or did arise in consequence of these transactions. Now was there a present existing indebtedness from Philpot and Picket, or Philpot, Sherman and Co. to Gruninger? and was the execution of this agreement by Gruninger, on the 6th of May, simply a motive for the giving of the note, and not the consideration of the note? It may be that that was held out as an inducement to the defendants to give the note, as a motive for putting the debt in the shape of a note rather than let it remain in its then present form. If that were so, then the defence would fail, because that proceeds upon the ground, as I understand, that the actual consideration of the giving of the note, not the motive for putting the claim in that form, was the signing of this agreement of the 6th of May and the transfer of the well No. 2. It may well happen that A may owe a valid debt to B, and B may say to A, if you will put the debt in the shape of a note I will do some act for you, and then when it is done, the promise to put the debt in that shape is not the consideration of the note but the debt which is due from one to the other."

2. The court erred in excluding from the consideration of the jury the articles of copartnership between Philpot, Sherman and Picket, (R., p. 51.)

3. The Court erred in overruling the motion of plaintiffs in error for leave to open and close the case to the jury. (R., p. 22.)

4. The Court erred in refusing to charge the jury (R., p. 23) that the writing signed by Lawrence, Gruninger and plaintiffs in error, dated Oct. 19th, 1864, for the sale of Well No. 2, Coombs lease, Blood Farm (R., p. 51), was a valid assignment of the interest of the said Gruninger in the term, and that on the 6th of May, 1865, when he sold and pretended to convey said term to plaintiffs in error (R., p. 50) he had no legal title thereto, and that the said last mentioned conveyance did not convey to plaintiffs in error the legal title thereto, and that the conveyance of such legal title by said Gruninger to plaintiffs in error was a condition precedent to the right of defendant in error to recover on the note sued on.

5. The Court erred in refusing to grant the motion of plaintiffs in error for a new trial. (R., p. 23.)

SAML. B. GOOKINS, and
JAS. H. ROBERTS,
Attys. for Plaintiffs in Error.

Supreme Court of the United States.

DECEMBER TERM, 1870.

BRIAN PHILPOT,
GEORGE J. SHERMAN AND
HENRY E. PICKET,
Plaintiffs in Error.

vs.

ALICE B. GRUNINGER,
EXECUTRIX OF LAWRENCE GRUNINGER, DECEASED,
Defendant in Error.

BRIEF OF O. K. A. HUTCHINSON,

FOR DEFENDANT IN ERROR.

HORTON & LEONARD, Printers, 10 & 12 N. Jefferson Street.

Supreme Court of the United States.

DECEMBER TERM, 1870.

BRIAN PHILPOT,
GEORGE J. SHERMAN AND
HENRY E. PICKET,
Plaintiffs in Error,

VS.

ALICE B. GRUNINGER,
EXECUTRIX OF LAWRENCE GRUNINGER, DECEASED,
Defendant in Error.

BRIEF OF O. K. A. HUTCHINSON,

FOR DEFENDANT IN ERROR.

HORTON & LEONARD, Printers, 10 & 12 N. Jefferson Street.

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, A. D. 1870.

BRIAN PHILPOT,
GEORGE J. SHERMAN AND
HENRY E. PICKET,
Plaintiffs in Error,

vs.

ALICE B. GRUNINGER,
Executrix of Lawrence Gruninger, deceased.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF OF DEFENDANT IN ERROR.

This action was commenced by Lawrence Gruninger on the 15th day of October, 1867, and on the 26th day of the same month the death of said Gruninger was suggested, and the defendant in error substituted as plaintiff in the court below.

Printed R., pp. 1 and 3.

The declaration contains two special counts on a promissory note for $3,000 (signed by Philpot, Sherman & Co., plaintiffs in error), and also the common counts.

P. 3.

Philpot & Picket pleaded non-assumpsit (which plea was withdrawn on the day of the trial), failure of consideration, and that the note was obtained by fraud.

Pp. 6, 7, 8, 9, 10, 11 and 12.

Sherman pleaded failure of consideration, non-assumpsit, and that plaintiff was not executrix.

Pp. 16, 17 and 18.

The two last-named pleas were both withdrawn on the day of the trial.

P. 21.

Issue was joined on all the above-named pleas.

There is but one exception to the ruling of the court relating to the admissibility of or the rejection of testimony, and that is the exception taken to the ruling of the court excluding the articles of copartnership signed by plaintiffs in error, and by them offered in evidence.

The only other exception is to a portion of the charge of the court.

The articles of partnership were offered by plaintiffs in error, for the purpose of showing that they were not partners on the 19th day of October, 1864, and they did not offer or propose to offer any other evidence of the fact sought to be established.

P. 51.

The partnership agreement was properly excluded —

First, Because, unsupported, it was no evidence of the time when the partnership was formed. It might have been drawn and signed on the day of the trial, and a party should not be allowed to manufacture testimony in his own favor.

Second, Because the question as to whether the partnership had been formed on the 19th day of October, 1864, was immaterial. There was no issue raised by the pleadings as to the copartnership. The defendants were declared against as partners, and the copartnership was not denied.

Revised Statutes of Illinois, chapter 40, sec. 8.
Gross Statutes, chapter 40, p. 270, sec. 12.

The only question before the court and jury was, whether the consideration of the note, or any part thereof, had failed, and the testimony was all directed to that point.

Pp. 24, 30, 38, 40, 42, 47, 54, 55, 60, 64, 66, 70, —.

While presenting the case to the jury, the court inquired of the counsel for the defendants if any special defence was relied upon for any one defendant that was not available for all the defendants; to which the counsel for the defendants replied that there was not.

P. 71.

There was no evidence of fraud, and the counsel did not, on the trial, attempt to sustain a plea of Philpot and Picket alleging fraud.

In the argument of the counsel for plaintiffs in error to sustain the exception to that portion of the charge which

makes a distinction between the motive and the consideration of the note, they have made some erroneous statements which I will now notice; and will call the attention of the court to the facts, so far as they relate to the question presented by the bill of exceptions.

On page 5 of the counsel's brief it is stated "That Bradley and Barnes swear unequivocally that the note and agreement were executed at the same time, and that while Gruninger claimed pay for the well it was refused on the ground that it proved worthless, and the note was then given in consideration that Gruninger would become a member and put his property into the new company and transfer the Well No. 2 to Philpot, Sherman & Co."

No reference is made to any page of the record to sustain the statement, and it is not correct. On the contrary, Bradley, a witness on behalf of plaintiffs in error (who says they refused to settle for the interest in Well No. 2 unless Gruninger would sign the agreement to go into the oil company) swears that he understood from the conversation between the parties (Philpot, Sherman & Gruninger), that the "consideration" of the note was the "settling up of some old trade they had made before by some of the parties," (Ans. to 31st and 32d int. p. 30), and he nowhere says that the consideration of the note was anything else.

Barnes, the other witness on behalf of the plaintiffs in error, and who, it is said, swears unequivocally, when asked as to what he knew about the consideration of the note, says it was given on the "supposition" that Gruninger was to go into the company, and he nowhere says that the

agreement to go into the company constituted any part of the consideration.

P. 38.

On page 6 of said brief it is stated "That the proof was conflicting as to whether the well was worthless, and Gruninger's representation about it false. Coombs swore that he had charge of the well and "that it was utterly worthless." No reference is made to the record to sustain this statement, and it is very erroneous. There is no evidence that the well was worthless when Philpot & Picket made the contract to pay $3,500 for it, and no evidence that Gruninger made any false representations in regard to it. What Coombs says about the value is said with reference to the 6th of May, 1865, and he does not sware that even then it was worthless. In answer to the 7th interrogatory he says "that the interest of the said Lawrence Gruninger in said well on the 6th of May, 1865, was worth very little, if anything."

P. 47.

On page 12 of this brief it is stated that at the time of the making up of the note "there *was* present D. W. Prince, Justin Bradley, the plaintiffs Brian Philpot, George J. Sherman, George T. Barnes, Sterling Bonsal and said Gruninger."

There is no evidence that Prince was present except that of Bradley, who swears that Erwin was present, but Erwin swears that he was not present, and it is admitted that as to him Bradley was mistaken. Prince swears that he was not present, and Bradley was also mistaken as to him.

The counsel in their brief assume that the contemplated oil company was actually formed and that Gruninger refused to go into it. There is no evidence that the company was formed, and two of the witnesses, Prince and Erwin, swear that the project had to be abandoned because it could not be formed under the laws of the State of Pennsylvania, and was abandoned by consent of plaintiffs in error; that Gruninger was willing to go into a company such as he agreed to go into.

Deposition of Prince, p. 56.

Testimony of Erwin, p. 70.

The charter of the company actually formed shows that it was an entirely different company.

P. 67.

A few references to the record will show that the charge of the court was based on the questions at issue, and that the jury could not have been misled.

On the 19th of October, 1864, Gruninger sold Philpot, Sherman & Co., or Philpot & Picket, two interests in oil wells, to wit: an interest in Well 15, Smith Farm, Cherry Run, and an interest in Well No. 2, Coombs' lease, Blood Farm. The Smith Farm interest was paid for. For the interest in Well No. 2 a contract was executed between Gruninger and Philpot & Picket, by which they agreed to pay Gruninger $3,500 for the interest, within thirty days from the date of the contract.

P. 51.

Philpot, Sherman & Co. were oil dealers and speculators in oil lands, and three witnesses, Prince, Cushman and Erwin,

testify that Gruninger's interest at that time was valuable, and that P., S. & Co. had opportunities of knowing the value of the well. Prince says: "Defendants, during the first half of the fall of 1864, had every opportunity of being acquainted with the value of Well No. 2, Coombs' lease: they were then there, frequently at the well. They had the same opportunities in October 1864."

Ans. to 9th int. p. 55.

Erwin says: "It was considered a promising well. Philpot and Picket had opportunities of ascertaining the value of the well in the fall of 1864:"

P. 70.

Cushman says: "I do know that it (Well No. 2) was a producing well. I helped put it down, did most of the drilling; it was a producing well, and at the time of the sale was producing from 16 to 25 bbls. per day."

P. 64.

In answer to the third cross interrogatory he says: "I know the character of these wells, at that time, by working on them, and I know their value, by being in the vicinity of them and other wells, and knowing the price for which wells were selling.* * * * Well on Coombs' lease was worth all they agreed to pay for it, $3,500.

P. 66.

Picket, on the 24th of February, 1865, promises by letter to settle for the interest in Well No. 2 (p. 77), and he afterwards tells Prince that they had given a note of $3,000 in settlement of that interest.

P. 55.

On the 5th of July, 1865, after the note had been presented for payment, and after the scheme of forming the oil company had been abandoned, Philpot, Sherman & Co. wrote to Gruninger from their Titusville office, that they were then unable to pay the note but would be glad to let him have some good property in settlement at any time.

P. 24.

It is substantially admitted in the brief of the counsel for plaintiffs in error that the evidence was sufficient to justify a verdict against Philpot & Picket, but they claim that it was insufficient to authorize a judgment against Sherman, and therefore the judgment must be reversed as to all. (Pp. 6 and 27 of brief.) It is clear, if Sherman is in any way wronged by the judgment (which I deny), that it is the result of his injudicious attempt to defeat a just claim against his co-defendants Philpot & Picket. The record shows that Sherman was not served with process—could not be found (p. 2) that he lived out of the jurisdiction of the court, and in the State of Pennsylvania. (P. 32.) That long after the suit was commenced he voluntarily appeared in the case and filed separate pleas. (P. 16.) If he thought that he was not justly liable for the debt he should not have placed himself in a position where judgment could be rendered against him. It is obvious that he hoped by appearing in the case to embarrass the defendant in error in her proceedings to collect a just debt, and he is not entitled to sympathy from any source, and certainly to no special consideration from this court.

Philpot & Picket were, beyond question, indebted to Gruninger on the 6th of May, 1865, in the sum of $3,500.

It is said they would not pay him unless he would sign an agreement to go into an oil company, and deduct $500 from the debt. He signs the agreement, takes the note of Philpot, Sherman & Co. for $3,000, and gives a deed of the interest in Well No. 2 to them. The court, after suggesting that there had been transactions between the parties, says: "Now, was there a present existing indebtedness from Philpot & Picket, or Philpot, Sherman & Co., to Gruninger? and was the execution of this agreement by Gruninger on the 6th of May simply a motive for the giving of the note, and not the consideration of the note? It may be that that was held out as an inducement to the defendants to give the note as a motive for putting the debt in a shape of a note rather than let it remain in its present form. If that was so, then the defense would fail, because that proceeds upon the ground, as I understand, that the actual consideration of the giving of the note, not the motive for putting the claim in that form, was the signing of this agreement of the 6th of May, and the transfer of the Well No. 2."

The argument of the counsel for the plaintiffs in error against the distinction of the court between motive and consideration amounts to this; because Philpot & Picket acted unconscionably in refusing to pay a just debt, and insisted on Gruninger's making a deduction of $500 and signing an agreement to go into an oil company (which agreement, the jury must have found, constituted no part of the consideration of the note), therefore as to Sherman, the motive for the giving of the note and the consideration of the note must have been the same, and recovery cannot be had of either Philpot, Picket or Sherman.

It was proved by Prince and Erwin that Sherman was a partner of Philpot & Picket when they contracted to pay $3,500 for the interest. (P. 54 and 70.) But leaving that fact out of view, the deed from Gruninger to Philpot, Sherman & Co., the cancellation of the $3,500 contract, and the deduction of $500, and the giving of further credit, were each a sufficient consideration to support the promise as to Sherman. The consideration mentioned in the deed to Philpot, Sherman & Co., was $3,000.

Of course no authorities are or can be cited to show that the court erred in the distinction drawn between a motive and the consideration. Nothing can be clearer than that the distinction is founded on principle. If the consideration of the note was the settling of the contract to pay $3,500, ought not the note to be paid? The language of the court in charging the jury was substantially the language of the pleas, and the jury were twice told that if the consideration of the note was the interest in Well 2, and the agreement to go into the company, and the interest was worthless, and Gruninger refused to go into the company, then the defense was made out.

All the instructions and explanations are to be considered together, to see whether they must, on the whole, have conveyed a correct idea to the jury.

Castle *vs.* Ballard, 23 Howard, 172.

Weegnive *vs.* Thompson, 7 Peters, 384.

On page 19 of the brief of the counsel for plaintiffs in error, it is stated "he (Gruninger) well knew they repudiated the original sale and transfer, as procured by false represen-

tations." I deny that there is any evidence that the plaintiffs in error, previous to giving the note, repudiated the original sale and transfer as procured by false representations, and no evidence is referred to to sustain the statement. And counsel insist that if the first conveyance or assignment of the lease to Philpot & Picket was valid, then the second was not, and he (Gruninger) could convey nothing by the latter to Philpot, Sherman & Co., the title having already vested by the former assignment in Philpot & Picket. This first "conveyance," or "assignment" as it is called, was the contract of the 19th of October, by which Gruninger sold or agreed to sell the interest in Well 2 to Philpot & Picket, and they agreed to pay him $3,500 within thirty days from that date. It is now claimed that the conveyance of this interest in Well No. 2 was a part of the consideration of this note, and that the deed to Philpot, Sherman & Picket, upon the compromise settlement of this contract, conveyed no title (Sherman knowing all about the $3,500 contract, and assenting to the giving of the note), and therefore the consideration failed. I respectfully submit that the statement of the point is all it is necessary to say in answer to the argument.

The counsel for the plaintiffs in error allege in their brief certain errors of which this court can take no notice.

P. 29 of Brief.

No exception was taken to any ruling of the court except the alleged errors Nos. 1 and 2, and those exceptions have already been sufficiently referred to herein.

In regard to the third, fourth and fifth alleged errors, the questions therein presented cannot be raised in this court.

With reference to the third alleged error, there is nothing in the record to show that any motion was made by the plaintiffs in error to open and conclude to the jury. There is a statement in the reasons for a new trial, filed by the counsel for the plaintiffs in error, that the court erred in that regard, but that is no part of the record upon which this court will act.

Admitting, however, that the plaintiffs in error did move the court to be allowed to open and conclude to the jury, and that the court denied the motion, I deny that any exception was taken to the ruling of the court, and error could not be assigned even if exception had been taken, for it was a matter in the discretion of the court.

1 Greenleaf Ev., sec. 76 and n.

Day *vs.* Woodworth, 13 Howard, 363.

U. S. *vs.* Dunham, 21 Law Rep., 591.

In regard to the fourth alleged error, there was no refusal by the court to charge the jury, as is therein assumed, although his Honor doubtless would have refused to do so, had he been asked. The only reference made to the record to sustain this assignment of error is to the reasons filed for a new trial.

An omission to charge on a particular point is not assignable for error unless there were a request to the court to instruct the jury on that point.

Express Co. *vs.* Kountze, 8 Wall., 342.

Armstrong *vs.* Toler, 11 Wh., 277.

Pennock *vs.* Dealogue, 2 Pet., 1.
Barrow *vs.* Ray, 9 Howard, 366.
Burnside *vs.* Grand Trunk R. R. Co., 47 N. H. 555.
Davis *vs.* Elliott, 15 Gray, 90.
Phila. R. R. Co. *vs.* Hazen, 47 Penn., 244.

A party who is not satisfied with a charge as given to a jury on any particular point, should ask the court to charge specifically on that point.

Bain *vs.* Doran, 54 Penn., 124.
Davis *vs.* Elliott, 15 Gray, 90.

It is no ground of error that the court did not discuss every possible aspect of the case in the absence of any request for instructions.

Wertz *vs.* May, 21 Penna. 228.

The fifth alleged error that the court erred in overruling the motion for a new trial requires no discussion, as this court has repeatedly decided that it is a question of discretion, and that for a refusal to grant a new trial error cannot be assigned.

Laber *vs.* Cooper, 7 Wall., 565.
Henderson *vs.* Moore, 5 Cr., 11.
Marine Insurance Co., *vs.* Young, 5 Cr.
Barr *vs.* Grant's heirs, 4 Wh. 213.
Schuchardt *vs.* Allen, 1 Wall., 371.

O. K. A. HUTCHINSON,
Attorney for Defendant in Error.